Necessity or Pragmatism?

The Development and Use of the Justification of Necessity in Medical Law

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ABSTRACT

Traditionally, the courts have been very reluctant to permit the use of necessity as a defence in civil or criminal cases. However, following the case of *F v.West Berkshire Health Authority* [1990] 2 A.C. 1 and up until the coming into force of the Mental Capacity Act 2005, the common law principle of necessity was extensively used in medical law to provide a lawful basis for the care and medical treatment of incapacitated adults without consent. This thesis examines why this was the case, and suggest that the answer may be found in the need to fill a "gap" in the law left by the ending of the *parens patriae* jurisdiction over incapacitated adults and in the development of the declaratory jurisdiction, enabling the courts to consider *ex ante* whether treatment is lawful and to exercise control over the application of the defence. It is suggested that judicial pragmatism, rather than legal principle lies behind this development and use of necessity

This essentially historical study (although the impact that the Mental Capacity Act 2005 will have upon the justification of necessity is examined) critically considers what judicial pragmatism is, before examining the development of the declaratory jurisdiction and its role, together with the justification of necessity, in providing a substitute to the former *parens patriae* jurisdiction. The origins of and development of the defence and its use in medical law cases are critically scrutinised. It is suggested that the 'principle' of necessity developed in *Re F* is essentially a pragmatic, rather than a principled construct, and that 'necessity' in this medico-legal context is essentially a paradoxical concept, being a best interests defence rather than one of true necessity, with the test of best interests being sufficiently vague and broad to permit the courts to maintain an illusion of coherence and consistency whilst maximising flexibility.

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Introduction

This study arose out of a longstanding interest in the development and use of the defence of necessity: both as an *ex post facto* defence in criminal trials and in civil cases concerning the medical treatment and care of adults who lacked capacity. Following the decision of the House of Lords in the case of *In Re F (Mental Patient: Sterilisation)*,[1] ("*re F"*), the declaratory jurisdiction was extensively used by family courts to make *ex ante* declarations that specific instances of medical treatment or care which it was proposed should be provided to incapacitated adults in their best interests were lawful, based upon a justification which has been termed the common law "principle of necessity".[2] A study of the decided cases in both criminal and civil jurisdictions reveals, I suggest, a marked difference between the approach of courts faced with defendants seeking to argue that concluded conduct was, in the circumstances of the case, necessary and lawful, and that of courts who have been asked to make *ex ante* declarations in relation to the treatment or care of incapacitated adults. In the former case, courts have been very reluctant to permit defences of necessity to succeed, and the cases in which the defence has been successful have tended to be 'one off' situations involving pressing emergencies. By contrast, the necessity justification formulated by Lord Goff in *Re F* [3] has been both expanded and extensively used via the declaratory jurisdiction to provide what is essentially a substitute for the former *parens patriae* jurisdiction in respect of incapacitated adults. My first, and

[1] [1990] 2 AC 1.
[2] [1990] 2 AC 1, Lord Goff, 74.
[3] *Ibid.*, 74-76.

main, research question was to ask and to explore why the principle of necessity had been so expansively used in medical law cases involving incapacitated adults, when the scope of defences based upon necessity had been tightly curbed in criminal and civil litigation: what had 'made the difference'?

I began with the decision in *re F* and, since the opinion of Lord Goff was the only only one to conduct a detailed exposition of the origins of and doctrine relating to the principle of necessity,[4] decided: first, to test the claims made by Lord Goff to the effect that "there exists in the common law a principle of necessity which may justify action which would otherwise be unlawful", since the use of the word 'principle' suggests the existence of doctrine that is "both relatively general and of positive value".[5] Second, I examined the historical origins of the use of the principle of necessity and the cases in which the principle had been used, to see if they supported Lord Goff's account of the doctrine relating to necessity.[6] Using Lord Goff's observations as a 'leaping-off' point, I conducted a review of the relevant literature, consisting of the case law in relation to the care and treatment of incapacitated adults both before and after *Re F*; the cases in which defences of necessity had arguably been raised to answer claims in tort; criminal cases in which necessity defences (including duress of circumstances) had been raised and cases where the principle of agency of necessity had been argued and used. In relation to the very old case law, dating back to medieval and Tudor times, which relates mostly to necessity as a defence to tortious claims, translations of the relevant year books were obtained from the reports of the Selden Society. In addition, relevant secondary material

[4] [1990] 2 AC 1, 73-78.
[5] N. MacCormick, *Legal Reasoning and Legal Theory* (1978), 152.
[6] [1990] 2 AC 1, 74.

was reviewed: the old works and commentaries of jurists such as Bracton, Coke, Blackstone, Hale, Viner and Noy; academic articles, monographs and texts. This study is a study of the development of English law, not a consistently comparative study, but where appropriate, I have considered case law and academic writings from relevant North American, Australasian and other foreign sources, not least because these cases have been considered by English judges in some of the key cases.

My conclusions at the end of this review of the 'necessity cases', was that the clear picture of the principle of necessity painted in *re F* by Lord Goff was not reflected in the cases, which presented a much more obscure view: defences of necessity have been raised in all manner of cases in tort and in the criminal law, although the paradigm case for the application of the defence appears to be a one off emergency situation where urgent intervention is reasonably required; in many of the early authorities the defence is not specifically referred to, and in many of the cases it is not entirely clear whether the defence being applied is public or private necessity, or private defence or prevention of crime. However, I suggest that an analysis of the case law discloses three things. First, that it is clear that any doctrine of necessity applied by the House of Lords in *Re F* was considerably wider than that applied in previous cases. Second, that notwithstanding Lord Goff's expressed view that a 'principle of necessity' runs through the common law, it is difficult to discern any clear or overarching principle of necessity from the approaches taken by the courts in the cases in which necessity appears to have been raised as an issue. Third, that Lord Goff's formulation and use of the doctrine of common law necessity in *Re F* is best regarded as an exercise in creative law-making. The 'principle'

of common law necessity used in *re F* and subsequent cases involving incapacitated adults certainly draws upon previous doctrine, particularly that in relation to agency of necessity, but it is substantially a new common law justification.

This then led me to the question of why this development has taken place. The first reason is made very clear in *re F*: the extinction of the *parens patriae* jurisdiction in respect of incapacitated adults with the coming into effect of the Mental Health Act 1959 had led to a position where there was a real question as to what, if any, common law justification made the treatment of an incompetent adult lawful, since the 1959 Act did not provide for the treatment of patients for conditions other than their mental disorder, and at common law no one could provide proxy consent on behalf of an incompetent adult.[7] There was an apparent gap in the law which needed to be filled because the legal uncertainty might lead to incapacitated adults not receiving treatment which they required. I suggest that the second reason for the widespread use of the justification of necessity in relation to the treatment and care of incapacitated adults is the use of the declaratory jurisdiction. Unlike cases in which defences of necessity are raised in respect of completed conduct, where courts are frequently concerned that "Necessity would open a door which no man could shut", [8] in these cases courts are being asked to rule *ex ante* as to whether a proposed course of treatment or care is lawful.

The literature relating to the origins of the declaratory jurisdiction and the medical law cases in which declaratory relief has been sought were reviewed, so that the context

[7] [1990] 2 AC 1, Lord Donaldson MR, 13 (CA); Lord Brandon, 57-58; Lord Goff, 71-72.
[8] *Southwark LBC* v. *Williams* [1971] Ch 734, Lord Denning MR, 743.

within which the development and use of the declaratory jurisdiction and the justification of necessity has taken place could be examined. This highlighted the particular difficulties which have arisen in medical law cases where the legality of doctors' conduct is uncertain and the role which the declaratory jurisdiction has played in providing doctors with *ex ante* 'authoritative guidance'.[9] It also revealed that: first, the declaratory jurisdiction is a particularly flexible and apt method of dealing with specific problems in medical law which the courts have had to determine, and second, that the discretionary nature of the jurisdiction; the orthodox view that declarations do not make conduct lawful, but merely 'declare' whether it is lawful; and the flexible approach which judges have generally adopted to issues relating to practice and procedure, provide them with significant control over the issues that they hear and determine.

The third body of literature which I investigated was that relating to the development and use of necessity *post re F*. Initially a review was made of all of the relevant literature, including the vast body of literature relating to the forced caesarean cases, although it became apparent that, to keep the study within set limits, the focus should be upon the specific problems that have arisen in relation to the doctrine of 'common law necessity' since *re F* and, in particular the relationship between 'necessity' and 'best interests', a topic which has received relatively little consideration in the literature.

In relation to the theoretical underpinnings of this study, I have used the philosophical approach of pragmatism to analyse the subject matter of this thesis.

[9] *Airedale NHS Trust* v. *Bland* [1993] AC 789, Lord Goff, 862-863.

However, this was not without a good deal of reflection and angst. Once one embarks upon a study of necessity as a doctrine, it becomes apparent at an early stage that it is a very difficult doctrine to pin down, as it emerges in a wide variety of cases, and in many of the cases it is not clear whether necessity is being used, or similar defences such as prevention of crime. I succumbed initially to the very lawyerly temptation of trying neatly to categorise cases, but nevertheless found it very difficult to find one overarching connecting theory which provided an adequate framework of analysis. Having read the works of Atiyah, Posner and Thomas on pragmatism and judicial decision-making, I began to see a way through the maze. Pragmatism, as a doctrine, is difficult to define, being essentially concerned with 'what works', but I suggest that it has much to offer to anyone undertaking a study of judicial decision-making, since it provides what I suggest is the most plausible account of how common law judges decide cases. I accept that, like all theoretical approaches, it has its faults, which I consider below in Part I. However, the use of pragmatic theory to analyse the use of declaratory jurisdiction and the defence of necessity in medical law helps to reveal the paradoxical nature of 'common law' necessity and provides what I suggest is the most satisfactory analysis of the tension or 'slippage' between necessity and best interests.

In essence, my thesis is this: the justification of necessity used by the House of Lords in *Re F* is best seen as an instance of pragmatic judicial creativity. Although Lord Goff, in formulating the justification had indicated that he was drawing on a 'principle' of necessity running through the common law, a review of the case law prior to *Re F* supports the assertion that any such principle is difficult, if not impossible, to find. The

defence existed, but operated within very narrow perameters. Common law necessity is best seen as a pragmatic paradoxical construct created to fill a specific lacuna in the law, being in essence a best interests defence, rather than one of true necessity. The linkage between necessity and best interests may be regarded as a pragmatic attempt to resolve the inconsistency and contradiction which results from this paradox, since the concept of best interests is sufficiently vague to allow judges to "have it both ways",[10] so that legal coherence can apparently be maintained, whilst at the same time, judicial flexibility can be maximised.

In Part I of this study, I examine the principle features of pragmatism, its application to judicial decision-making, both generally and in relation to medical law cases, and assess the merits and demerits of such pragmatic decision-making.

In Part II, I examine the context within which the development and use of the declaratory jurisdiction and the justification of common law necessity took place in Chapter 3, considering the development of the declaratory jurisdiction both generally, and in relation to medical law and exploring the reasons behind the extensive use of the declaratory jurisdiction in medical law cases. In Chapter 4, I focus more particularly upon the use of the declaratory judgment in medical law cases, considering the development and practical use of the jurisdiction.

[10] O. Perez, "The Institutionalisation of Inconsistency: From Fluid Concepts to Random Walk", in O. Perez and G. Teubner (eds), *Paradoxes and Inconsistencies in the Law* (2006), 127.

In Part III, I examine in Chapter 5 the origins of the doctrine of common law necessity, reviewing the use of defences of necessity in cases in tort and criminal law prior to *Re F*. I consider whether in fact an analysis of the cases decided prior to *Re F* supports the assertion that there was a pre-existing principle of necessity running through the common law and whether the decision in *Re F* is to be regarded as following on from previous legal doctrine or as creating new law. In Chapter 6, I consider the possible legal methods of justifying the treatment of adult patients without consent, examining the benefits and disadvantages of these methods and whether necessity was the best option available to the House of Lords in *Re F*.

In Part IV, in Chapter 7, I consider the use and development of the justification of necessity following the decision in *re F*, examining tensions which have arisen in relation to the justification and how they have been resolved by the courts. I also examine the link between necessity and best interests and the shift from the former to the latter as the declaratory jurisdiction in respect of incapacitated adults has developed. In Chapter 8, I consider the changes made to the law by the Mental Capacity Act 2005 and assess whether the coming into force of this Act means that the use of the justification of necessity in medical law may be consigned to the history books. Finally, this thesis ends with my conclusions.

Part I

Theoretical Underpinnings

Chapter 1

Judicial Pragmatism: Its Features, Strengths and Weaknesses

Introduction

The focus of this study is upon judicial decision making in the context of medical law: in particular upon the development of the declaratory jurisdiction and the use of the common law defence of necessity to justify the provision of medical treatment to adults who lack capacity. There is a considerable literature upon the subject of how judges ought to or do decide cases.[1] A detailed examination of this literature is beyond the scope of this study. It is a central part of my thesis that the courts, in developing the declaratory jurisdiction in medical law to resolve difficult cases where the law is "bound up with fundamental and emotive questions of medical ethics"[2] and in using what the courts have termed the "principle" or "doctrine"[3] of necessity to justify the provision of medical treatment, are adopting a pragmatic, rather than a principled approach. Judges may speak of the principle of necessity, but ultimately they are making pragmatic decisions as to whether treatment is or should be lawful. This does not mean that principle plays no part

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[1] See *e.g.* H.L.A. Hart, *The Concept of Law*, 2nd edn. (1994); Lord Reid, "The Judge as Law Maker" [1972] 12 *JSPTL* 22; Lord Devlin, "Judges and Lawmakers", [1976] 39 *MLR* 1; N. MacCormick, *Legal Reasoning and Legal Theory* (1978); S. Lee, *Judging* Judges (1988); R. Dworkin: "Political Judges and the Rule of Law", (1978) *Proceedings of the British Academy* 259, *Law's Empire* (1986), *Justice in Robes* (2006); R.A. Posner: *Overcoming Law* (1995), *The Problematics of Legal and Moral Theory* (1999), *Law, Pragmatism and Democracy* (2003); T. Bingham, *The Business of Judging* (2000); E.W. Thomas, *The Judicial Process* (2005).

[2] Lord Woolf, "Are the Courts Excessively Deferential to the Medical Profession?" [2001] 9 *Med L Rev* 1

[3] See *e.g. In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, Lord Goff, 74; *R* v. *Bournewood Community and Mental Health NHS Trust, Ex parte L* [1999] 1 AC 458, Lord Goff, 490; *In re F (Adult: Court's Jurisdiction)* [2001] Fam 38.

in such decision-making. What I suggest is that a study of the cases in which the courts have decided that the treatment or care of incapacitated adults is justified by necessity and/or because it is in the best interests of the patient[4] indicates that principle is not ultimately permitted to get in the way of a judge's pragmatic view of what is the correct outcome of the case. This tension between principle and pragmatism helps to explain the lack of doctrinal clarity in relation to the use of necessity as a defence in medical cases and why the boundaries between necessity and other actual or emerging defences such as self-defence, public interest or best interests are blurred.

In this chapter, I consider what is meant by pragmatism or the pragmatic approach in the context of judicial decision-making and assess its main strengths and weaknesses. This is an important back-drop for the following chapters, in which I examine and analyse the case law in relation to the development of the declaratory jurisdiction and the use of the defence of necessity to justify the provision of medical treatment without consent. Whilst I recognise that realism and practical considerations play a crucial part in any functioning court system, and that the pragmatic approach has numerous strengths, it also has the potential to descend into what may be regarded as a form of elitist and theoretically insufficient pragmatism which is disrespectful of individual rights. I suggest that a study of these "medical necessity" cases discloses that the decision-making in such cases may be seen to be an impoverished form of pragmatism, displaying many of the

[4] The judgments in these cases do not always make it entirely clear upon which basis the treatment or care is being justified: See *e.g. In Re Y (Mental Patient: Bone Marrow Donation)* [1997] Fam 110. This is explored in Ch. 7, below.

weaknesses commonly associated with the pragmatic approach.[5] There is, however, scope for the courts to attain a better form of pragmatism, since many of the criticisms levelled at the pragmatic approach can be avoided, in particular by the adoption of an approach which is sensitive to narrative and context.

What is meant by pragmatism in the context of judicial decision-making?

A study of dictionary definitions of pragmatism suggest that it is essentially an approach to the subject matter under consideration rather than one discrete doctrine:[6] it denotes a 'matter-of-fact treatment of things',[7] with particular attention being paid to facts and with emphasis being placed upon practical consequences rather than upon theory or ideals.[8] The American pragmatic philosopher, William James, described pragmatism as representing an empiricist attitude[9], but one which rejected 'abstraction and insufficiency,…verbal solutions,…bad a priori reasons,…fixed principles, closed systems and pretended absolutes and origins',[10] turning 'towards concreteness and

[5] See *e.g.* 31-32, 33-35, 38-39, 51-53. *C.f.* P.S. Atiyah, *Pragmatism and Theory in English Law* (1987) Hamlyn Lectures, thirty-ninth series.

[6] *C.f.* H.S. Thayer, who with regard to the American pragmatic philosophers, has noted that: "It is primarily as a movement than by any one doctrine that pragmatism is best understood", *Pragmatism: The Classic Writings* (1982), 11.

[7] Oxford English Dictionary Online ("OED online"), http://dictionary.oed.com (accessed 10/08/2008). *C.f.* the entry in Chambers 20th Century Dictionary (1983), 1009:

> …matter-of-factness: concern for the practicable rather than for theories and ideals: a treatment of history with an eye to cause and effect and practical lessons: humanism or practicalism, a philosophy or philosophical method, that makes practical consequences the test of truth…

[8] *Ibid.*

[9] *C.f.* what Max Weber called "empirical" law finding. Legal concepts are found empirically from decided cases and practical legal experience, rather than being imposed upon the law. M. Weber, *Law in Economy and Society* (1954), 316-317. *C.f.* R. Cotterrill, *The Politics of Jurisprudence*, 2nd edn. (2003), 101; P. Ghosh, "Max Weber and William James: 'Pragmatism', Psychology, Religion" (2005) 5 *Max Weber Studies* 243-280.

[10] W. James, *What Pragmatism Means* (1907), ch. II, reproduced in Thayer (n.6), Ch. IX, 213.

adequacy, towards facts, towards action and towards power.'[11] As James conceded, pragmatism does not take any position as to the end results to be achieved, but is really a 'method of settling metaphysical disputes that otherwise might be interminable.'[12]

As far as pragmatism in the context of legal adjudication is concerned, similar considerations seem to apply. Judges determining cases rarely have the luxury of having sufficient time time to indulge in metaphysical debate and, as MacCormick has observed: "'Non liquet' is not an available judgment; the Court must rule on the law and decide for one party or the other, and all concerned must live with the result".[13] Richard Posner and E.W. Thomas, who have both had careers as judges[14] and who have written extensively upon the subject of pragmatism and the law,[15] see legal pragmatism as being an attitude or approach to law rather than a clear legal doctrine in itself .[16] As Posner has noted, this makes pragmatism something of 'a devil to define',[17] because there is no 'canonical concept'[18] of pragmatism: in order to describe it in a satisfactory fashion, one needs to consider what features it possesses. This is not a wholly straightforward exercise, because there is not necessarily agreement as to the attributes of pragmatism, it 'can mean

[11] *Ibid. C.f.* 215, where he describes the pragmatic method as: "The attitude of looking away from first things, principles, 'categories', supposed necessities; and of looking towards last things, fruits, consequences, facts."
[12] *Ibid,* 210.
[13] Above, (n.1), 249.
[14] Richard Posner was a judge of the U.S. Court of Appeals (7th Circuit), sitting as Chief Justice between 1993 and 2000. E.W.Thomas has been a judge of the New Zealand High Court, Court of Appeal and Supreme Court, and a member of the Privy Council.
[15] R.A. Posner *Overcoming Law* (1995)*; The Problematics of Moral and Legal Theory* (1999), Ch. 4; *Law, Pragmatism and Democracy* (2003). E.W. Thomas *The Judicial Process* (2003).
[16] *E.g.* Posner has stated that legal pragmatism is "more a tradition, attitude or outlook than a body of doctrine", (2003) *ibid.*, 26; whilst Thomas sees it as being "…essentially an attitude or approach possessing certain recognisable attributes;" *ibid.* 312. *C.f.* Dworkin (1986), (n.1), 153; (2006), (n.1), 21-22.
[17] Posner *Law, Pragmatism and Democracy* (2003), 24
[18] Posner, *Overcoming Law* (1995), 4.

different things to different people.'[19] For example, as we will see below, there may be disagreement as to the role of common sense in pragmatic adjudication.[20] Thomas has suggested the following definition of legal pragmatism:

> …it is essentially functionalist; it emphasises realism; it relies upon and values experience; it eschews abstract theories lacking any fundamental purpose and shuns a doctrinaire approach; it is concerned with the practical consequences or impact of the law; its evaluation of any issue is both realistic and practical; and its judgments are practical judgments designed to further the objectives of a law obligated to meet the needs and expectations of society.[21]

This definition is a starting point, although it needs to be fleshed out if one is to attain a proper appreciation of the features of legal pragmatism. The repetition contained within the quotation is noteworthy, for the essence of the pragmatic approach is that it seeks to be practical, concerned with what 'works'.[22] I suggest that the other features really flow from this: for instance, being a practical approach, it is unsurprising that it seeks to be firmly grounded in reality rather than theory or doctrine for their own sake. Much has been written about pragmatism in general and in relation to law in particular.[23] I do not, within the scope of this study, seek to review this extensive literature. I suggest that it is reasonably uncontroversial to say the English common law system is generally regarded

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[19] Thomas (n.1), 307.

[20] Below, Ch.2. Although Posner has made it clear in his works that he regards himself as a pragmatist (see: *Problems of Jurisprudence* (1990), (n.16) ch.4; (n.18); his credentials as such have not been universally accepted. Rosen has argued that much of Posner's account of pragmatism, in particular his account of "reasonableness" is "not very pragmatic."(J. Rosen , "Overcoming Posner" (1995) 105 *Yale LJ*, 581, 583). *C.f.* S. Fish, "Almost Pragmatism: Richard Posner's Jurisprudence" (1990) 57 *U Chi L Rev* 1447; M. Sullivan, *Legal Pragmatism: Community, Rights and Democracy* (2007) ch.3. Sullivan argues that Posner's "everyday pragmatism", which is hostile to the use of philosophy to guide judicial decision making is a "thin" account of pragmatism and that "pragmatic method is a theoretical and critical enterprise" (*Ibid*., 57). In addition, he is critical of aspects of Posner's method, arguing that some of Posner's reasoning in *Law, Pragmatism and Democracy* "does not embody the attributes of pragmatic analysis" (*ibid*., 63. Sullivan discusses this reasoning more specifically at 64-72)

[21] Thomas (n.1), 312.

[22] Posner (n.17, n.18).

[23] *E.g*. Posner (n.15); R.Rorty, *Consequence of Pragmatism* (1982); M. Brint and W. Weaver (eds.) *Pragmatism in Law and Society* (1991); R. Dworkin, *Law's Empire* (1986); B.Z. Tamanaha *Realistic Socio-Legal Theory* (1997); J.L. Coleman, *The Practice of Principle* (2001); M. Sullivan, (n.20).

as favouring a pragmatic approach[24] and that this is, in the main, accepted by the judiciary.[25] Indeed, it may be said that such an approach is an inherent part of a case-based common law system.[26] What I aim to do in this chapter, is to examine the features of pragmatic decision-making within the common law system and to assess the strengths and weaknesses of these features, particularly in relation to issues which may arise in medical law in general and to cases involving incapacitated adults in particular.

Principles, facts and the common law system

A key feature of pragmatic adjudication is its emphasis upon the facts of the case under consideration. Being an approach concerned with practical problem-solving, pragmatism is concerned with the reality of the case under consideration, preferring substance over form.[27] In order to ascertain this reality, the pragmatic approach starts with the evidence in the case and places emphasis upon the facts which may be 'found' from the evidence.[28] Decision-making in the common law system at first instance has been described as "bottom-up" decision-making: judges tend to start by reasoning 'upwards' from the facts.[29] The facts of the case therefore assume primary importance, because the legal decisions available to the judge are likely to depend on the facts 'found'

[24] *E.g.* A. Lester, "English Judges as Law Makers" [1993] *PL* 269, 290; Atiyah (n.5), 3:

> …English lawyers are not only more inclined to the pragmatic and somewhat hostile to the theoretical approach, but positively glory in this preference.

C.f. Gray and Rorty, who consider pragmatism to be banal because it "is the implicit working theory of most good lawyers": T. Gray, "Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory" (1990) 63 *S Cal LR* 1569, 1590; R. Rorty, "The Banality of Pragmatism and the Poetry of Justice", in Brint and Weaver (n.23), 89.

[25] *E.g.* Thomas (n.1); Lord Goff of Chieveley, "The Future of the Common Law" [1997] 46 *ICLQ* 745, 753.

[26] *Ibid.* Below, 27 onwards.

[27] Thomas (n.1), 312

[28] Posner (n.18), 227, 242.

[29] Lord Goff (n.25), 753. *C.f.* Dworkin (2006), (n.1), 54.

by her. This approach, by which the law develops case by case, may be contrasted with an approach which takes pre-existing general principle as its starting point and works 'downwards', which is what tends to occur in codified continental systems.[30] As MacCormick has noted, within a codified system the temptation, particularly if the relevant code is considered comprehensively to cover the field of law, is to "refer every dispute and decision thereon to some article or articles of a Code".[31] This more principled approach means that codified legal systems may be regarded as having a greater degree of systemic rationality than the English common law system.[32] Certainly this was the view taken by Weber, who recognised that both the type and rationality of legal decision-making could vary. Decision-making could be formally or substantively rational or irrational. It may be regarded as formally irrational when one applies "means in decision-making which cannot be controlled by the intellect"[33] and substantively irrational when decisions are reached on a case by case basis according to their individual concrete factors, being based upon a decision-maker's ethical, emotional or political response rather than upon general norms.[34] By contrast, decision-making may be seen to be essentially formally rational when derived by deduction from the rules and logic of a specifically legal system,[35] and substantively rational when, although decisions are made according to specific principles or norms, these norms or principles are derived from

[30] *Ibid.*; R. Cotterrell, *The Sociology of Law*, 2nd edn. (1992), 17.
[31] MacCormick (n.1), 68.
[32] Weber (n.9), 316. *C.f.* R. Reiner, "Classical Social Theory and Law", in J. Penner, D. Schiff and R. Nobles, *Jurisprudence & Legal Theory* (2002), Ch.6, 252-258; Cotterrell (n.30), 153-154; D.M. Trubek, "Max Weber on Law and the Rise of Capitalism" (1972) *Wis L Rev* 720, 729-730.
[33] Weber (n.9), 63. Weber gives as an example of such decision-making the consulting of oracles (*ibid.*).
[34] Weber, *ibid.*; Reiner (n.32), 254. This was termed by Weber "khadi" justice, and he regarded the use of the jury as an example of this: *ibid*., 317.
[35] Weber, *ibid.* Reiner (n.32), 255. Weber recognises that this formalism may be of two types: either the legally relevant characteristics may be of a tangible nature (*e.g.* the requirement in certain instances for contracts to be sealed or for signatures to be witnessed), or it may be found where "the legally relevant characteristics of the facts are dislosed through the logical analysis of meaning and where…definitely fixed legal concepts in the form of highly abstract rules are formulated and applied": *ibid.*

"ethical imperatives, utilitarian and other expedential rules, and political maxims",[36] rather than from a legal source. Whilst recognising that all formal law was, at least formally, rational to a certain extent, Weber saw the English approach to legal decision-making as being "essentially an empirical art",[37] reliant upon observation and experience rather than theory or logic, with there being "practically no English legal science which would have merited the name of "learning" in the continental sense"[38] until the nineteenth century. He did, however, recognise that the later and lesser development of theoretical jurisprudence in English law had been responsible for its less formally rational, more pragmatic tone, leading to "the "practical adaptability of English Law and its "practical" character from the standpoint of the public".[39] This greater scope for flexibility with regard to the creation and use of legal principles within the common law's 'bottom-up' approach has been recognised by Lord Goff, who has described the working methods of common lawyers in the following terms:[40]

> Common lawyers tend to proceed by analogy, moving gradually from case to case. We tend to avoid large, abstract, generalisations, preferring limited, temporary, formulations, the principles gradually emerging from concrete cases as they are decided…The result is that we tend to think of each case as having a relatively limited effect, a base for future operations as the law develops forwards from case to case - and occasionally backwards if we are modest enough to recognise that perhaps they have gone too far. This method of working can be epitomised in the statement that common lawyers worship at the shrine of the working hypothesis.

[36] *Ibid.*
[37] Weber (n.9), 316.
[38] *Ibid.*
[39] *Ibid.*
[40] Goff (n.25). *C.f.* H. Pitkin, *Wittgenstein and Justice* (1972), 50-51.

In a common law system, disputes may arise which do not involve any issue of statute law.[41] Where a dispute raises an issue for which there is some precedent in case law, the legal position may not always be clear-cut: previously decided cases may contain clear rulings upon a well-defined, relevant legal point, but they may be less than clear, and the ratio of some cases may be difficult or even impossible to discern.[42] Where principles have been established by the common law, they may always be revised or expanded in subsequent cases, where a new factual scenario is being considered, or a court is faced with an issue which differs from one previously examined.[43] Even where a judge is faced with a recognised legal principle, founded in precedent, she may find that this does not provide a conclusive answer to the case in hand. First, the application of that particular principle to the facts of the case may be a matter of dispute: in such a case, the legal principle does not provide the solution, but rather provides "guidance as to the relevant evaluative considerations which may legitimately be used in in justification of a concrete ruling one way or the other."[44] MacCormick gives as an illustration of this the personal injuries case of *British Transport Commission* v. *Gourley*,[45] in which the majority of the House of Lords overturned "several authorities and a long line of practice against taking tax liability into account in assessing damages"[46] in respect of loss of earnings, preferring to determine the case upon "the general principle on which damages are assessed",[47] namely that a "successful plaintiff is entitled to have awarded to him such a sum as will, so far as possible, make good to him the financial loss which he has

[41] See *e.g.Chester* v. *Afshar* [2004] UKHL 41; [2005] 1 AC 134
[42] MacCormick (n.1), 84-85. See *e.g. Re A (Children)(Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961.
[43] Above (n.40).
[44] MacCormick (n.1), 177.
[45] *Ibid.*; [1956] AC 185.
[46] [1956] AC 185, Lord Reid, 211-212.
[47] *Ibid.*, 212.

suffered and will probably suffer as a result of the wrong done to him for which the defendant is responsible",[48] subject to the question of remoteness of damage. Second, the "determination of the decisive or morally relevant features"[49] in a case may prove to be a difficult and controversial business,[50] presenting a judge with a number of options. For example, in the American case of Claire Conroy,[51] the court had to consider whether to withdraw artificial feeding from an elderly woman suffering from severe, permanent mental and physical impairments, but who was not brain dead, comatose or in a persistent vegetative state ("PVS"). The earlier case of PVS patient Karen Quinlan,[52] in which the Supreme Court of New Jersey had upheld the patient's father's claim to be appointed as her guardian and to authorise the discontinuance of all extraordinary medical life-sustaining procedures, was evidently an important and relevant authority. However, as Arras has noted, the court, in considering the relevance of the Quinlan case to Claire Conroy's situation had to consider a number of difficult issues in determining whether the authority of *Conroy* ought to be followed:

> Was it crucial that Ms. Quinlan was described as being in a persistent vegetative state? Or that she was being maintained by a mechanical respirator? If so, then one might well conclude that Claire Conroy's situation- i.e., that of a patient with severe dementia being maintained by a plastic, nasogastric feeding tube is sufficiently disanalogous to Quinlan's to compel continued treatment. On the other hand, a re-reading of Quinlan might reveal other features of that case that tell in favour of withdrawing Conroy's feeding tube, such as the unlikelihood of Karen ever recovering sapient life, the bleakness of her prognosis, and the questionable proportion of benefits to burdens derived from the treatment.[53]

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[48] *Ibid.*
[49] J.D. Arras, "Getting Down to Cases: The Revival of Casuistry in Bioethics" (1991) 16 *Journal of Medicine and Philosophy* 29, 35.
[50] *Ibid.*
[51] *Matter of Claire C. Conroy* (1985) 486 A 2d 1209 (Supreme Court of New Jersey). See Arras (n.49).
[52] *Matter of Quinlan* (1976) 355 A 2d 647 (Supreme Court of New Jersey).
[53] Arras (n.49), 35. Following the decision of the New Jersey Supreme Court Karen Quinlan was taken off a ventilator but continued to breath unaided until she died from pneumonia in 1985: See M. Brazier and E. Cave, *Medicine, Patients and the Law*, 5th edn. (2011), 149, 566-567. Claire Conroy died before the Court of Appeal hearing, but the case neverthless proceeded through the appeal process, with the Supreme Court

The emphasis upon facts

In the "bottom-up" decision-making of the common law, the determination of the relevant facts in a case at first instance will take up a good deal of judicial time,[54] since the judge must hear the evidence, assess it and determine the facts of the case:

> Nine-tenths of the time of a judge at first instance is taken up with getting at the facts-keeping control of the proceedings, watching the witnesses and evaluating the evidence.[55]

Two reasons may be identified for the fact-finding process being of central importance in civil cases.[56] First, most cases are determined upon their facts: the legal outcome will depend upon the facts found by the judge.[57] Most cases involve what Jaffe has termed 'the disinterested application of known law'[58] to a dispute about the facts. But in all cases, even those where the principles of law applicable to the case are not in dispute, the judge will need to determine which aspects of the evidence are relevant to the issues in the case and then decide which facts she 'finds' before deciding which legal principles are applicable.[59] For example, in *B* v. *An NHS Hospital Trust*,[60] Dame Elizabeth Butler-Sloss, P, having heard and read the evidence of Ms. B and a number of doctors, found

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of New Jersey holding that artificial feeding could be regarded as being "equivalent to artificial breathing by means of a respirator. Both prolong life through mechanical means when the body is no longer able to perform a vital bodily function on its own" (n.33, 1236), and establishing criteria to govern end of life treatment decisions. For discussion of the Conroy case see *e.g.* J.K. Mason and G.T. Laurie, *Mason and McCall Smith's Law and Medical Ethics*, 7th edn. (2006), 633-634; 8th edn. (2010), 571; I. Kennedy and A. Grubb, *Medical Law*, 3rd. Edn. (2000), 2089-2097.

[54] *C.f.* Lee (n.1), 6.

[55] Lord Reid (n.1), 22.

[56] Lord Bingham (n.1), 3.

[57] *Ibid. C.f* Thomas (n. 15), 321; Cardozo, *The Nature of the Judicial Process* (1921), 128-129 (cited by Lord Bingham (n.1), 3): "Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts."

[58] Jaffe *English and American Judges as Lawmakers* (1969), 13. *C.f.* Devlin, "Judges and Lawmakers" [1976] 39 *MLR* 1, 2-3.

[59] Thomas (n. 15), 321-327

[60] [2002] EWHC 429 (Fam), [2002] 1 FLR 1090.

that Ms. B had had capacity since August 2001 to make relevant decisions about her medical treatment, including the decision as to whether to withdraw from artificial ventilation.[61] This finding in turn led to the conclusions that that Ms. B was entitled to refuse medical treatment, even though this would lead to her death, and that the Hospital, by declining to follow her wishes, had been treating her unlawfully since August 2001, and had committed the tort of trespass to the person.[62] Had Butler-Sloss P determined that Ms B lacked capacity, the hospital would have been entitled to treat her under the 'principle' of necessity in her best interests, in spite of her purported refusal.[63]

Second, once the facts have been determined by a court, they are very unlikely to be revised on appeal. Appellate courts take account of the fact that the tribunal of first instance had the opportunity to see the witnesses in court: to hear their oral evidence and assess their demeanour and is therefore in a much better position to judge where the truth lies.[64] The Court of Appeal pays a good deal of deference to the factual determinations of the trial judge:

> …first and last and all the time, he has the great advantage, which is denied to the Court of Appeal, of seeing the witnesses and watching their demeanour…the Court of Appeal should be slow to upset the judgment arrived at by the judge who both saw and heard the persons who gave evidence.[65]

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[61] *Ibid*., para.95.
[62] *Ibid*., paras.96-98.
[63] *Ibid.*, para. 32; *In Re T (Adult: Refusal of Treatment)*[1993] Fam 95, 115-116.
[64] *Powell and Wife* v. *Streatham Manor Nursing Home* [1935] AC 243, Viscount Sankey LC, 251.
[65] *Ibid.* See *e.g. Kinloch* v. *Young* [1911] SC (HL) 1, Lord Loreburn 4; *Watt or Thomas* v. *Thomas* [1947] AC 484, Viscount Simon, 486; *Onassis* v. *Vergottis* [1968] 2 Lloyd's Rep. 403, Lord Pearce, 431; *Gross* v. *Lewis Hillman Ltd* [1970] Ch. 445; *Winter* v. *Boynton* [1991] (unreported, Westlaw ref: WL 837770; CA). *C.f.* Bingham (n. 1), 7-9.

An example of such deference may be seen in *Re A (Children)(Conjoined Twins: Separation)* ('*Re A*'):[66] the well-known case of conjoined twins Mary and Jodie.[67] In that case, Johnson J had concluded that "to prolong Mary's life for those few months would…be very seriously to her disadvantage",[68] based upon his view that a "horrendous scenario"[69] would arise, with Mary being "dragged around"[70] by Jodie. On appeal, this finding was criticised by counsel for the parents and for Mary, upon the basis that the judge had excluded cogent evidence that Mary probably did not feel pain,[71] but Robert Walker LJ, whilst conceding that "[t]here may be force in that criticism",[72] made it clear that: "…this court would be slow to differ from the findings of this very experienced family judge who had seen and heard all the witnesses".[73]

Even where criticisms may properly be made of the trial judge's finding of fact, it is therefore generally very difficult to overturn a judgment on appeal on the basis that she has made factual errors. As Lord Reid has recognised: "if [the judge] gets the facts wrong his mistake is generally irretrievable".[74] This is not to say, however, that an appellate

[66] [2000] 4 All ER 961.
[67] The HCt and subsequently the CA were asked to sanction an operation to separate conjoined twins, Mary and Jodie, notwithstanding that this would lead to Mary's death. All of the CA judges ruled that the separation was lawful for different reasons: Ward LJ indicated that the doctors could rely upon a plea of quasi self defence; Brooke LJ ruled that the operation could be justified by necessity and Robert Walker LJ concluded that the surgery was in the best interests of both twins and that the doctrine of double effect prevented the doctor's foresight of death as amounting to a guilty intention. For further discussion see *E.g*. S. Holm and C.A. Erin, "Deciding on Life- An Ethical Analysis of the Manchester Conjoined Twins Case" (2001) 6 *Jahrbuch Fur Wissenschaft Und Ethik* 67; R. Gillon, "Imposed separation of conjoined twins- moral hubris by the English courts?" (2001) 27 *Journal of Medical Ethics* 3 and the articles contained in the Autumn edition of [2001] 9 *Med. L. Rev*. 201-298.
[68] (2000) 57 BMLR 1, 11
[69] *Ibid.*
[70] *Ibid.*
[71] For a criticism of Johnson J's conclusions upon this issue see: A. D. Dreger *One of Us: Conjoined Twins and the Future of Normal* (2004), 99.
[72] [2000] 4 All ER 961, 1057.
[73] *Ibid.*
[74] Lord Reid (n. 1), 22.

court will never overturn a judgment upon the basis that the trial judge has erred in respect of the facts. The Court of Appeal has indicated that it is prepared to step in where a judge has "failed to use or has palpably misused his advantage",[75] for example, if there is "no evidence to support a particular conclusion".[76] It may also allow an appeal on the basis of a question of fact where it decides that the judge has drawn unjustified inferences from undisputed facts. For example, in *Whitehouse v. Jordan,*[77] an action in negligence, it was alleged that an obstetrician had, whilst carrying out a 'trial of forceps delivery', caused brain damage by pulling too strongly and for too long upon the baby's head, so that it had become stuck. The House of Lords held that the Court of Appeal had been entitled to reach a different view from the trial judge as to whether the evidence was sufficient to lead to a finding of negligence.[78] Since no issue arose with regard to the credibility of the witnesses and the issue was whether inferences had properly been drawn from the facts, this was a case where the appellate court could reassess the trial judge's decision on the facts.[79] Lord Bridge stated that:

> …in the realm of fact, as the authorities repeated emphasise, the advantages which the judge derives from seeing and hearing the witnesses must always be respected by an appellate court. At the same time, the importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed

[75] *Owners of Steamship Hontestroom* v. *Owners of Steamship Sagaporack* [1927] AC 37, Lord Sumner, 47.
[76] *Watt or Thomas* v. *Thomas* (n.44), Viscount Simon, 486.
[77] [1981] 1 WLR 246.
[78] *Ibid*, 257. Bush J. had concluded from the mother's evidence that she had been pulled towards the bottom end of the delivery couch in such a manner and with such force that this was inconsistent with a 'trial of labour' being properly carried out. He also concluded from the medical evidence that he was doubtful whether a trial of forceps was being carried out, as opposed to an attempt at vaginal delivery, which had failed, leading to the plaintiff's head being unjustifiably wedged, but that, in any event, if a trial of forceps had been conducted, then the defending doctor had pulled too hard and for too long, so that the baby's head had become stuck. The Court of Appeal and the House of Lords decided that these inferences could not properly be drawn from the evidence. *C.f.* the Australian case of *Voulis* v. *Kozary* [1975] 180 CLR 177.
[79] [1981] 1 WLR 246, Lord Fraser, 263.

> primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.[80]

The emphasis upon the facts of the case under consideration may be seen as being part of the "English pragmatic tradition"[81] of judicial decision-making because it leads predominately to judgments being based upon practical, individual fact-situations rather than merely being concerned with the application of legal theory.[82] Professor Atiyah has identified this as being a strength of this tradition because such emphasis allows judges a good deal of flexibility in their decision-making, since it "enables judges to avoid what may be a facile and apparent consistency of approach which overlooks deep underlying distinctions."[83]

However, it is not without its difficulties. The heavy reliance of the common law approach upon the facts disclosed in individual cases may facilitate practical, flexible decision-making, but I suggest that the fairness of such decision-making neverthless depends upon the accuracy and balance of the evidence before the court. By 'balance', I mean balance as between the parties: for example, a case in which there may be said to be inequalty of arms in relation to the preparation and presentation of the evidence before the court. Where the 'story' or narrative placed before the court is incomplete or inaccurate, I suggest that this is likely adversely to affect the quality and fairness of the decision-making in the case. The decision-making in such cases may still be pragmatic,

[80] [1981] 1 WLR 246, 269-270.
[81] P. S. Atiyah, *Pragmatism and Theory in English Law* (1987) Hamlyn Lectures, thirty-ninth series , 43. *C.f.* S. Lee's review of this work: "Pragmatism and Theory in English Law" [1987] 103 *LQR* 484.
[82] Bingham (n.1), 186. *C.f.* R.Goff, "The Search for Principle" [1983] LXIX *Proc. British Academy* 169, 180: "…it is important that the dominant element in the development of the law should be professional reaction to individual fact-situations, rather than theoretical development of legal principles." *C.f.* Weber, (n.9).
[83] Atiyah (n.81) 53.

but I would suggest that it may be regarded as an impoverished form of pragmatism. In our adversarial system the facts are not usually laid before the court in a neutral fashion. The counsel or solicitor acting for a party will usually have to set out her client's case, whether in a formal application, originating summons or other pleadings, and will adduce written or oral evidence and argue the case in a partial manner, namely the manner which (in her opinion) best represents her client's interests.[84] In relation to cases involving medical treatment in respect of adults who lack capacity, I suggest that, in spite of the fact that the Official Solicitor has been there ostensibly to represent the interests of the incapacitated person,[85] the narrative before the court has tended to be biased towards the medical approach and that this may have led to the significant wishes and interests of the patient being obscured.

In civil litigation the Civil Procedure Rules[86] provide a procedural code for the conduct of litigation. This code, although it has the overriding objective of "enabling the court to deal with cases justly",[87] has a pragmatic tone. Litigation is to be reined in by practical considerations; expense and court time is to be saved wherever possible[88] and cases are to be dealt with in a manner which is 'proportionate':

(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and

[84] MacCormick, (n.1), 119. *C.f. Thompson* v. *Glasgow Corporation* [1962] SC (HL) 36, 52 (cited at MacCormick, *ibid.*):

> …each side, working at arm's length, selects its own evidence. Each side's selection of its own evidence may, for various reasons, be partial in every sense of the term…

[85] With the coming into effect of the Mental Capacity Act 2005, the Official Solicitor may also represent incapacitated adults in proceedings before the Court of Protection: http://www.officialsolicitor.gov.uk/os/offsol.htm .
[86] Civil Procedure Rules 1998, SI 1998/3132.
[87] CPR r.1.1.
[88] *Ibid*

(iv) to the financial position of each party.[89]

Courts are to 'actively manage' cases, ensuring that the issues in the case are identified at an early stage, prioritising the issues which need to be determined fully and disposing of the other issues in a summary fashion.[90] The aim is to keep areas of dispute to a minimum whenever possible. Similar provisions have subsequently been adopted in the rules of procedure governing practice in other courts: for example, the Court of Protection Rules 2007,[91] which govern applications made to the Court of Protection under the Mental Capacity Act 2005, provide that "dealing with a case justly" in accordance with the overriding objective:

> ...includes so far as practicable-
> (a) ensuring that it is dealt with expeditiously and fairly;
> (b) ensuring that P's interests and position are properly considered;
> (c) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
> (d) ensuring that the parties are on an equal footing;
> (e) saving expense; and
> (f) allotting to it an appropriate share of the court's resources, while taking account of the need to allot resources to other cases.[92]

Clearly efficient use must be made of court time, however, in medical law cases the fairness of litigation may be compromised as far as the evidence is concerned, particularly in two types of situation, both of which have arisen in cases in which courts have held that treatment is justified by the principle of necessity. The first of these is in emergency cases where 'snap' decisions have had to be made in relation to treatment, frequently upon the basis of scanty (or sometimes no) evidence produced on behalf of the

[89] CPR r.1.1(2)
[90] CPR r.1.4.
[91] SI 2007/1744. The Rules have been amended by The Court of Protection (Amendment) Rules 2011, SI 2011/2753.
[92] *Ibid.* R. 3(3). *C.f.* similar provisions in the Criminal Procdure Rules 2010, SI 2010/60, r.1.1 and the Family Procedure Rules 2010, SI 2010/2955, r.1.1.

Applicant.[93] The second has arisen particularly in cases where orders are sought in relation to the treatment or care of incapacitated adults. The usual course for such litigation prior to the coming into force of the Mental Capacity Act 2005 was for an application to be made by a hospital trust or health authority to the High Court for a declaration that a certain course of medical treatment (for example, sterilisation) would be lawful.[94] The difficulty in such cases was that the incapacitated person's views were unlikely to be before the court, save in an indirect fashion.[95] The issues in such a case are usually dependent upon the terms of the application made and defined by the evidence in support (usually consisting largely or wholly of "expert" evidence from medical practitioners and social workers). As Kennedy has observed, since this evidence, which he terms the "dossier", is prepared by "experts", it usually takes into account factors which they regard as being significant, reflecting a "medical" agenda, and may not satisfactorily address human rights issues.[96] Because of the tendency of the Offical Solicitor to follow the medical opinion presented by the applicant,[97] it may be very difficult for a court to do anything other than follow the experts' opinion.[98] In addition, the reported authorities indicate that the courts are reluctant to open out the issues in the case, preferring not to address difficult questions which are pertinent to the welfare of the incapacitated person, for example, whether the patient is capable of consenting to sexual

[93] See *e.g. re SL (adult patient)(medical treatment)* [2000] 2 FLR 389.
[94] The Mental Capacity Act 2005 ("MCA '05") came into force on the 1st October 2007. From that date such applications are to be made to the Court of Protection: s.15 MCA '05.
[95] A notable exception to this being the case of *A Local Authority v. MM* [2007] EWHC 2003 (Fam); [2009] 1 FLR 443, where the incapacitated adult, MM, gave oral evidence and was described by Munby J as giving "in many ways a bravura performance" (at [57]).
[96] I. Kennedy, "Patients, Doctors and Human Rights", in *Treat Me Right*, (1988), 394. *C.f.* N. Cica, "Sterilising the Intellectually Disabled: The Approach of the High Court of Australia in Department of Health v. J.W.B & S.M.B." [1993] 1 *Med L Rev* 186, 215.
[97] See *e.g. S, re (Adult: Refusal of Treatment)* [1993] Fam 123*; Norfolk and Norwich Healthcare NHS Trust v W* [1996] 2 FLR 613; B. Hewson, "Freedom tiptoes out the door" (1997) *Independent,* March 5.
[98] Kennedy, (n.96). See *e.g. Re A* (n.66-67).

contact and whether, by permitting such contact, exploitation is being condoned.[99] The one-sided and incomplete nature of the narrative before the court has the potential to cause injustice in such cases, all the more so since determinations made by the court of first instance in respect of the facts are unlikely to be overturned on appeal.

The preference of pragmatism over theory or principle

The frequently quoted comment of Oliver Wendell Holmes: "The Life of the Law has not been logic: it has been experience",[100] has been seen as being symbolic of the common law's preference for the pragmatic approach.[101] The courts are likely to decide in favour of what works in practice, rather than following a theoretical or strictly principled approach. Logic has its place in the common law, for instance, MacCormick has demonstrated that the logic of deductive reasoning plays its part in judicial reasoning: judges have to give reasons for their decisions and regularly use the logic of deductive inference in order to justify their decisions,[102] "setting out findings of fact and propositions of law from which a given conclusion necessarily follows"[103] as a precursor to the giving of this conclusion in the order or decision made. This is not to say that judges usually use a strictly logical process when reasoning their way to their conclusions, in the sense of demonstrating that the conclusion of their argument logically

[99] See Lee (n.1), 101-106.
[100] O.W. Holmes, *The Common Law*, (1881) p.1
[101] Atiyah (n.81), 8. *C.f.* H.L.A. Hart "Diamonds and String: Holmes on the Common Law", in *Essays in Jurisprudence and Philosophy* (1983). Hart regards this maxim as having been "too frequently torn from its context and misapplied" and states that it was formulated by Holmes as a prophylactic "against the excessive rationalization and moralization of the law thich were the occupational diseases of the legal theorist", a view which "fits" with a preference for the pragmatic approach.
[102] MacCormick (n.1), Ch.II. *C.f.* Atiyah (n.81), 14-15; 44-55.
[103] MacCormick, *ibid.*, 36.

follows from the major and minor premises of the argument.[104] As Atiyah has noted, although judges use logic in their reasoning, in the sense of applying it to their reasoning process, their reasoning process rarely follows a strictly logical approach: they do not often use logic "in the sense of reasoning their way to a conclusion which is not otherwise obvious by a process of logic",[105] and when they try to do so, they frequently make logical errors.[106] The pragmatic approach does not entirely banish logic from judicial reasoning: a judge may use logical argument in his judgment as a means of demonstrating that his conclusions are rational and properly based upon the evidence and relevant principles of law, rather than personal caprice. Logic may also be used in a different, wider, and more everyday sense by judges, a form which perhaps bears more resemblance to common sense reasoning rather than strict logic. In this sense, when an argument or a result is said to be "logical", what is really meant is that it "makes sense", or that it is consistent with a set of propositions which the court wishes to follow.[107]

Professor Atiyah has argued that the fact that judges feel able, in appropriate cases, to reject what might be seen as the strictly logical answer,[108] means that "the courts

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[104] *Ibid.*, 20-27. As MacCormick notes (*ibid.*, 24), the process of reasoning may be expressed in the following terms:

> (A) In any case, if *p* then *q*
> (B) In the instant case *p*
> (C) Therefore, in the instant case, *q*

[105] Atiyah (n.81), 15.

[106] Ibid:

> Lord Radcliffe once suggested that a professor of logic would find some sad howlers even in famous judgments – 'the undistributed middle, transference of meaning in the use of the same word, questions begging until they are in rags' and so on.

[107] MacCormick (n.1), 38-39; Atiyah (n.81), 16-17.

[108] See *e.g. Jefford* v. *Gee* [1970] 2 QB 130 (Referred to by Atiyah (n.81), 47); *R* v. *Howe* [1989] AC 417, Lord Hailsham, 432:

> …consistency and logic, though inherently desirable, are not always prime characteristics of a penal code based like the common law on custom and precedent. Law so based is not an exact science.

retain the constant power to qualify or amend previous rulings in the light of other principles of the law, other objectives of the legal system, as new facts come to light."[109] The pragmatic approach permits judges to reach the most appropriate decision in the particular case without being hidebound by logic, precedent or established principles.[110] Even Lord Goff, who has favoured the adoption of a principled approach,[111] and who formulated principles relating to 'common law necessity' in *Re F*,[112] has recognised that:

> …it is important that the dominant element in the development of the law should be professional reaction to individual fact-situations, rather than theoretical development of legal principles. Pragmatism must be the watchword.[113]

It may be argued that it is a strength and a sign of realism within the system that past rulings and legal principles are not allowed to stand in the way of "justice, ethics and commonsense."[114] For example: where adherence to principle might lead to the law becoming excessively complex and cumbersome, unnecessarily increasing legal costs;[115] or where old-fashioned anomalies exist within the law which need either to be removed[116] or kept within tight bounds;[117] or where adopting a strictly logical or principled approach

[109] Atiyah (n.81), 50. *C.f.* Weber (n. 9), 316.
[110] *Ibid.*
[111] See *e.g.* Goff (n.82), 169; R.Goff & G.Jones , *The Law of Restitution*, 7th rev. edn. (2006), Ch.17; C. Mitchell, P. Mitchell and S. Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 8th edn. (2011), Ch.18; W. Swadling and G. Jones (eds.) *The Search for Principle* (2000).
[112] [1990] 2 AC 1.
[113] Goff (n.82), 185-186.
[114] *DPP* v. *Majewski* [1977] AC 443, Lord Salmon, 484; Atiyah (n.81), 10-11, 49-50. *C.f. DPP* v. *Morgan* [1976] AC 182.
[115] Atiyah (n.81), 47-48; *c.f. Jefford* v. *Gee* [1970] 2 QB 130
[116] See *e.g.* the abolition of the marital rape exemption: *R* v. *R (Rape: Marital Exemption)* [1992] 1 AC 599. Cf. Balcombe LJ, "Judicial Decisions and Social Attitudes", [1994] 84 *Proceedings of the British Academy* 209, 211, where he refers to this as an example of "how the courts have accepted and reflected what they have perceived to have been a change in the attitude of society towards marriage."
[117] Atiyah, (n.81) 51-52; *Best* v. *Samuel Fox & Co Ltd* [1952] AC 716.

might interfere with issues or objectives which are seen to be more important, such as social protection and the prevention of crime.[118]

This flexibility may, however, also be seen as one of the most significant weaknesses of the pragmatic approach, for it may be criticised as interfering with the creation of "a coherent, systematic body of principle".[119] Dworkin is particularly critical of what he regards pragmatism's focus upon short term expediency and its failure to respect or value past decisions:[120]

> The pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do.

Of course, if pragmatic judges were eager to jettison previous authorities and principles and to decide cases in the way which they consider to "be best for the future without concern for the past",[121] and if consistency with the past was desirable, pragmatism might be said to be an undesirable approach to legal theory.[122] However, Dworkin himself has recognised that his construction of pragmatism is one which "perhaps no philosopher would defend",[123] and it has been criticised as amounting to the construction of a straw man.[124] As Sullivan notes, Dworkin is right when he states that pragmatism

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[118] See *e.g. Majewski* (n.114) ; *c.f.* W. Wilson, *Criminal Law, Doctrine and Theory*, 4th edn., (2011), 226-227.
[119] *Ibid.*
[120] Dworkin (1986), (n.1), 161. *C.f.* (2006), (n.1), 21-22. *C.f.* Posner, who has suggested that if this definition is rewritten to state: "pragmatist judges always try to do the best they can for the present and the future, unchecked by any felt duty to secure consistency in principle with what other officials have done in the past", it would amount to a "working definition of pragmatism" (1999), (n.1), 241.
[121] *Ibid.*, 151.
[122] S.M. Smith, "The Pursuit of Pragmatism" (1990-1991) 100 *Yale L J* 409, 412.
[123] Dworkin (1986), (n.1), 94.
[124] See *e.g.* Sullivan (n.20), 33.

does not value consistency with past decisions as an end in itself,[125] but wrong to suggest that it disrespects past decisions and historical context.[126] The primary concern of the pragmatic decision maker is to ensure that their legal decisions effectively resolve the problems before them, including the problem of maintaining sufficient consistency in legal decisions to cultivate "a sense of fairness in the application of the law"[127] and so that individuals are able to predict what behaviour will be lawful, and, if necessary, take steps to avoid litigation.[128] According to such an approach, precedent and legal principle will be applied where it helps to resolve the issues in the case and departed from where it does not.[129] The problem with such an approach, as Sullivan observes, "is not that it does not take precedent seriously, but rather that it does not take it mechanically in a way that fosters easy or uniform prediction."[130]

A further criticism which may be made of the pragmatism's flexibility in relation to the application of principle is that, if judges adopt a highly practical approach, 'muddling' along on a case by case basis, they may lose sight of the the "big picture", resolving individual legal disputes at the expense of rationality and the development of doctrine or theory within the law.[131] As Weber noted, whilst doctrinal systemisation had been taking placing within continental codified legal systems, providing a rational, calculable basis for the development of capitalist economies, this had not happened in the case of the less rational English legal system, which was concerned with pragmatic

[125] *Ibid*., 33, 38.
[126] *Ibid*., 42.
[127] *Ibid.*, 38
[128] *Ibid.*
[129] *Ibid.*, 41.
[130] *Ibid*., 45
[131] Atiyah (n.81), 90-91, 103, 106.

problem solving on a case by case basis, where judges had "belatedly and pragmatically provided devices to aid commercial development".[132] Indeed, he suggested that: "It may be said that England achieved capitalistic supremacy among the nations not because but rather in spite of its judicial system."[133] Under the common law system, legal development may well be delayed, and when it does take place, do so in a piecemeal, incremental manner.[134] The 'muddling along' approach may also have the effect of stultifying legal reform which is needed, for if the law seems to be working satisfactorily, politicians and lawyers may feel that change is either not required, or can wait.[135] This is a criticism which is particularly relevant in the context of the common law's development of necessity to justify the treatment of incapacitated adults, since it may be argued that because the courts had acted to fill the gap in the law, legislation to resolve the problem was seen as being less immediately urgent, and the mental capacity legislation was therefore inevitably further delayed, there being a gestation period of about sixteen years from the beginning of the Law Commission investigation into decision-making in relation to mental incapacity to the passing of the Mental Capacity Act 2005.[136]

[132] Cotterrell (n.30), 154.
[133] Weber (n.9), 231. A full exposition of Weber's analysis of economy and law is beyond the scope of this thesis, see *e.g.*Trubek, (n.32); M. Albrow, *Max Weber's Construction of Social Theory* (1990).
[134] *C.f.* Lord Goff (n.25).
[135] *C.f.* A. Norrie, *Crime, Reason and History*, 2nd edn. (2001), 25-26; R. Cross, "The Reports of the Criminal Law Commissioners (1833-1849) and the Abortive Bills of 1853", in P.R. Glazebrook (ed.), *Reshaping the Criminal Law* (1978), 5, 10-13.
[136] P.Bartlett, *Blackstone's Guide to The Mental Capacity Act 2005*, 2nd edn. (2008), ix; *c.f.* L.Com., *Mentally Incapacitated Adults and Decision-Making: An Overview*, Consultation Paper No.119 (1991), 1.

Vagueness, paradox and pragmatism

I have suggested that one of the main features of the pragmatic approach is that principle is generally not allowed to get in the way of what the judge sees as being the "right" decision. However, legal pragmatism may affect the development of legal doctrine in another manner. In circumstances where the existing recognised law is dysfunctional or inadequate, judges, when formulating legal doctrine to deal with specific problems in such circumstances, may create or use principles or concepts which are paradoxical and/or vague, in an attempt to restore the adequacy of the law.[137]

Where the law is perceived as being not fit for its purpose, judges may seek to restore its adequacy by the formulation of a legal principle, intended to be of application in future cases. As MacCormick has observed, the bestowing of the title 'principle' upon a legal norm implies "that it is both relatively general and of positive value".[138] When formulating legal principles, judges do not usually pluck them from nowhere, but justify their formulation as "expressing the underlying common purpose of a set of specific rules",[139] which "at once rationalizes the existing law so as to reveal it in a new understanding, and provides a sufficient ground for justifying a new development in the relevant field".[140] An example of this may be found in Lord Goff's formulation of common law necessity in *Re F*.[141] Having stated: "That there exists in the common law a

[137] *C.f.* J. Clam, "The Reference of Paradox: Missing Paradoxity as Real Perplexity in Both Systems Theory and Deconstruction", in O. Perez and G. Teubner (eds), *Paradoxes and Inconsistencies in the Law* (2006), 79.
[138] (n.1), 152.
[139] *Ibid.*, 126.
[140] *Ibid.*
[141] [1990] 2 AC 1, 74-75.

principle of necessity which may justify action which would otherwise be unlawful is not in doubt",[142] he drew upon the Roman doctrine of *negotiorum gestio*, old common law cases "concerned with action taken by the master of a ship in distant parts in the interests of the shipowner",[143] and "the principle of necessity from the cases on agency of necessity in mercantile law",[144] both to justify and to provide a basis for his formulation of the 'principle' of necessity:[145]

> ...it has been said that the agent must act bona fide in the interests of his principal: see *Prager* v. *Blatspiel Stamp & Heacock Ltd* [1924] 1 KB 566, 572 *per* McCardie J. A broader statement of the principle is to be found in the advice of the Privy Council delivered by Sir Montague Smith in *Australasian Steam Navigation Co* v. *Morse* (1872) LR 4 PC 222, 230…:
>
> > "when by the force of circumstances a man has the duty cast upon him of taking some action for another, and under that obligation, adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may be properly said of the course so taken, that it was, in a mercantile sense, necessary to take it."
>
> In a sense, these statements overlap. But from them can be derived the basic requirements, applicable in these cases of necessity, that, to fall within the principle, not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted person, but also (2) the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person.

The creation of common law principles may be seen as an attempt to rationalise and bring coherence to the law.[146] However, legal principles or concepts may be created which are paradoxical. Originally, the term 'paradox' denoted a statement which was "contrary to accepted opinion",[147] a usage which, according to Perez, is still used in

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[142] *Ibid.*, 74. See below, Ch.5, where I suggest that, notwithstanding this comment, a general overarching principle of necessity cannot be ascertained from the cases prior to *Re F* and that, in the rare cases where necessity was permitted to justify *ex post facto* action which would otherwise be unlawful, it tended to be tightly circumscribed.
[143] *Ibid.*, 75
[144] *Ibid.*
[145] *Ibid.* See below, Ch. 5.
[146] Above, 24-25; MacCormick (n.1), 126.
[147] Concise Oxford Dictionary (2006), 11th rev.edn.

everyday parlance.[148] The more usual modern meaning of the word is either "a person or thing that combines contradictory features or qualities",[149] or "an apparently sound statement or proposition which leads to a logically unacceptable conclusion".[150] As Perez has observed,[151] philosophers seeking to define paradox have, in common with the dictionary definition, either focused on the internal conflict between propositions contained within a set of propositions (for example, Rescher describes paradox as a "set of propositions that are individually plausible but collectively inconsistent"),[152] or upon the conclusions drawn from the propositions: for example, Sainsbury describes a paradox as "an apparently unacceptable conclusion derived by apparently acceptable reasoning from apparently acceptable premises";[153] whilst Quine defines a paradox (or antinomy, as he describes it) as producing "a self-contradiction by accepted ways of reasoning".[154]

Where paradoxes arise in the law, I suggest that, because of the conflict or inconsistency which is part and parcel of the paradox, they inevitably lead to logical tensions within the law.[155] Fletcher notes that because paradoxes raise "troubling contradictions",[156] they disturb the consistency of legal doctrine and that, if a consistent legal theory is to be achieved, some way must be found of resolving the paradox. However, they need not inevitably be regarded as negative phenomena. Where there has

[148] O. Perez, "Law in the Air: A Prologue to the World of Legal Paradoxes", in Perez and Teubner (n. 137), 5.
[149] Above (n.137).
[150] *Ibid.*
[151] Above (n.148).
[152] N. Rescher, *Paradoxes: Their Roots, Range and Resolution* (2001), xxi.
[153] R.M. Sainsbury, *Paradoxes* (1995), 2nd edn., 1.
[154] W.V.Quine, *The Ways of Paradox and Other Essays* (1966), 7. *C.f.* G.P. Fletcher, "Paradoxes in Legal Thought" (1985) 85 *Colum. L.Rev.* 1263.
[155] *C.f.* G. Fletcher (n.154), 1263.
[156] *Ibid.*

been a 'gap' or lacuna in the law, even the formulation of a paradoxical legal principle may be regarded as a doctrinal improvement, albeit an imperfect one. Besides, from the point of view of critical legal study and doctrinal development, it may be argued that the mere process of exposing the "paradoxes of law by formal logical operations and genealogical investigations reveals how much modern law…is exposed to contradiction, inconsistency, chaos and paralysis",[157] a reflective exercise which may in turn lead to or promote further legal development.[158]

A pragmatist concerned merely with the outcome of the instant case rather than with the development of legal theory, when faced with a legal paradox, might deal with the disclosed inconsistency by ignoring it entirely. As Fletcher observes:

> The Holmesian belief that "the life of the law has been experience rather than logic" provides a good excuse for ignoring seeming contradictions in the structures of legal argument.[159]

Such an approach may provide a solution to the instant case, but does not promote either a complete understanding of or the rational development of legal doctrine.[160]

However, there are a number of pragmatic ways in which paradoxes in the law may be dealt with so as to restore or ameliorate legal consistency. The first is simply "by abstaining from the legal practice that leads us into contradiction".[161] The second is "by finding or constructing a distinction- like that between form and substance- that dissolves

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[157] Perez (n.148), 27.
[158] *Ibid. C.f.* G.Teubner, "Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter", and R. Wiethölter, "Justifications of a Law of Society", both in Perez and Teubner (n.137), 41 and 65 respectively; Fletcher (n.154), 1265.
[159] *Ibid.*, 1264.
[160] *Ibid.*
[161] *Ibid.* 1269.

the paradox".[162] Fletcher gives as an example of such an approach the manner in which the law treats the crime of bigamy.[163] The *actus reus* of bigamy is usually defined as marrying a person whilst at the same time being married to another person,[164] yet a marriage contracted during the currency of a prior valid marriage is void, even though it may, as a matter of common sense be regarded as a 'marriage'.[165] The legal paradox is that the second marriage is bigamous, yet it is not legally a marriage. This is resolved by using "the distinction between form and substance. The crime consists not in validly contracting a second marriage, but in purporting to do so, in going through the forms of a marriage ceremony while already married".[166] This form/substance distinction is not the only manner of resolving paradoxes: for example, one might make a distinction between factual and legal status,[167] or between objective legal norms and "subjective criteria of personal responsibility",[168] or between "substantive principle and procedural relief".[169]

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[162] *Ibid.*
[163] *Ibid.*, 1268-1269.
[164] Offences Against the Person Act 1861, s.57.
[165] Matrimonial Causes Act 1973, s.11; Fletcher (n.154), 1268.
[166] Fletcher, *ibid.*
[167] *Ibid.*, 1279. Fletcher gives as an example of this the manner in which American contract law, when dealing with the problem of "pre-existing debt as consideration", distinguishes between "promising as a natural fact and contracting as a legal phenomenon", *ibid.* For the position in English law see *e.g.* E. Peel, *Treitel The Law of Contract*, 12th edn. (2007); *Stilk* v. *Myrick* (1890) 2 Camp. 317, *Collins* v. *Godefroy* (1831) 1 B & Ad 950; *c.f. Williams* v. *Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 QB 1.
[168] Fletcher, *ibid. E.g.* Hall has suggested that a defence of mistake of law ought not to be recognised in criminal law, because to allow the acquittal of a defendant upon the basis of his belief that he was acting legally would create conflict with the view "that legal norms are external and objective; they cannot be displaced simply by a personal opinion about what the law is" (Fletcher, *ibid.*, 1270). Fletcher suggests that this defence could be permitted in certain circumstances and the paradox resolved by recognising "the distinction between the law as a norm of behaviour and the distinct question whether someone is personally to blame for violating that norm.
[169] *Ibid.* 1279. *E.g.* Fletcher has suggested that the common law's habit of prospectively overruling previous case-law may be regarded as paradoxical because it:

> poses a contradiction to our assumptions about the legal order. We are committed to the view that the law to be interpreted is objective and singular…But prospective overruling expresses the Court's recognition that the Constitution requires one decision for one group of litigants, and something quite different for another group. (1274)

He has suggested that one way in which this paradox might be resolved is to shift the emphasis away from the substantive legal principle to procedural options, *e.g.* by denying colatteral relief in such cases (1278).

A further method of dealing with legal paradox is by the use of vague concepts or principles in an attempt to maintain at least a veneer of consistency and coherence and to dilute or conceal the paradox.[170] For example, as Perez has observed: "as a 'fair' arbiter, the law is expected to rule in a consistent fashion",[171] yet it is also expected, where appropriate "to respect the cultural idiosyncrasies of the different communities and discourses comprising the society in which it operates".[172] The paradox is that in order to be seen as fair, the law is expected to be "simultaneously consistent and inconsistent".[173] Perez suggests that the law has managed this paradox by using vague concepts such as 'reasonableness':

> …vagueness makes inconsistency– and, consequently, the paradox– less noticeable. It allows the law to apply what looks like a single concept across diverse cases, altering at the same time the meaning of this concept at the application stage- maintaining in this way a façade of consistency. In other words, the disordered vagueness of its conceptual space allows the law to 'have it both ways'.[174]

I suggest that this combined use of paradoxical and vague legal principles and concepts may be seen as according with the pragmatic approach because it allows the courts to maintain an illusion of coherence and consistency, whilst at the same time retaining sufficient flexibility to deal with a wide variety of individual cases in what is considered to be an appropriate manner. However, whilst the use of vague concepts is a useful tool in the management of legal paradoxes, it may itself create tensions within the law, particularly in cases in which the courts, in order to make a case 'fit' within established

[170] O. Perez, "The Institutionalisation of Inconsistency: from Fluid Concepts to Random Walk", in Perez and Teubner (n.137), 119.
[171] *Ibid.*, 122.
[172] *Ibid.*, 121.
[173] *Ibid.*, 122.
[174] *Ibid.*, 127.

principle, interpret the concept in a manner which strains credibility.[175] In such cases, as Perez has observed, "the façade of coherence generated by the use of fluid concepts may break, threatening the law's legitimacy and endangering its stability".[176]

Accommodating a defence of necessity or lesser evils in civil or criminal law inevitably introduces paradox and tension into the law because, by allowing individuals to justify conduct which would otherwise be unlawful, such a defence interferes with and destabilises the coherence of accepted norms.[177] This was recognised by Lord Denning MR in the case of *Southwark London Borough Council v. Williams*, when he stated that:[178]

> ...if hunger were once allowed to be an excuse for stealing, it would open a way through which all kinds of lawlessness would pass...if homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut.

However, in relation to the development of the defence of common law necessity in relation to incapacitated adults, I suggest that this is not the only respect in which paradox and tension has been introduced into the common law. Prior to *Re F*, the law in relation to the medical treatment of incapacitated adults may be said to have been dysfunctional, in that the former *parens patriae* jurisdiction which the Crown had exercised over incompetent adults had come to an end and had not been replaced by any statute making general provision for the treatment of such adults.[179] Since the common law did not make

[175] See *e.g. Re Y (Mental Incapacity: Bone Marrow Transplant)* [1997] Fam 110.
[176] Perez (n.148), 137.
[177] This is further explored in Part.III below, in which I examine the use of necessity as a defence in civil and criminal law.
[178] [1971] Ch 733, 744.
[179] Below, Ch.5.

any provision for anyone to consent to treatment on behalf of an adult who was unable to provide a valid consent herself, there appeared to be something of a 'gap' in the law. This gap was filled in *Re F,* when the House of Lords revealed that the common law principle of necessity justified the provision of medical treatment to adults who were temporarily or permanently disabled from consenting to it,[180] in their best interests. On a 'common sense' level, although in *Re F*[181] and subsequent cases[182] reference is made to the 'principle' or 'doctrine' of necessity, the use of the label 'necessity' in this context may be regarded as being paradoxical, since, an ordinary interpretation of the term implies that it is a prerequisite for the application of the doctrine that the treatment should in fact be 'necessary'. In fact, even in *Re F* it was recognised that the term 'necessity' is used here in a loose sense:

> …if a rigid criterion of necessity were to be applied to determine what is and what is not lawful in the treatment of the unconscious and the incompetent, many of those unfortunate enough to be deprived of the capacity to make or communicate rational decisions…might be deprived of treatment which it would be entirely beneficial for them to receive.[183]

An analysis of the case law reveals that in many of the cases the justification bears more resemblance to a best interests justification than one of strict necessity.[184] In addition, the test of whether the treatment is in the patient's 'best interests', which I suggest is the most significant element of common law necessity, is a test which allows the courts to take into account not only the patient's best 'medical interests', but also whether the treatment

[180] *Re F* [1990] 2 AC 1, 74. *C.f.* Lord Bridge, 51-52; Lord Brandon, 67-68.
[181] *Ibid.*
[182] See *e.g R* v. *Bournewood Community and Mental Health, NHS Trust ex p. L* [1999] 1 AC 458, Lord Goff, 485-486, 490.
[183] *Re F*, Lord Bridge, 52.
[184] See *e.g. Re W (Mental Patient) (Sterilisation)* [1993] 1 FLR 381 and Ch.7 below where this is further explored.

is of emotional, psychological or social benefit to her.[185] A wide variety of factors relating to the patient's circumstances and background may be considered. Although a single test, it is therefore sufficiently broad and vague to be applicable across a wide variety of cases.[186]

The emphasis upon remedies

A further feature which is particularly identified by Atiyah as being linked to the pragmatic tradition, is the emphasis which the common law places upon remedies, with the law being concerned with practical problem-solving, rather than mere theory. He points to the development of the Mareva[187] and Anton Pillar[188] injunctions in recent years to solve particular problems arising during the course of litigation. The first being developed to stop defendants removing assets from the jurisdiction or otherwise dissipating them so as to 'cock a snook at the majesty of English law',[189] whilst the second was developed to deal with problems which had arisen in cases involving copyright 'pirates', allowing a plaintiff to enter and search premises and to inspect written records available at the premises, in order to discover the identity of those responsible for the fraud and to obtain information about the scale of sale of pirated goods, which may then be used to support a claim for lost royalties.[190] The development of the declaratory jurisdiction in recent years in medical law, may also be seen as the

[185] *Re Y (Mental Incapacity:Marrow Transplant)* [1997] 2 FCR 172; *Re MB (Medical Treatment)* [1997] 2 FCR 541; *Re SL (Adult Patient) (Medical Treatment)* [2000] 2 FLR 389.
[186] Below, Ch. 7.
[187] Now termed "Freezing Orders/Injunctions": see CPR Part 25, Practice direction PD25 (http://www.doa.gov.uk/civil/procrules_fin/contents) .
[188] Now termed "Search Orders"; *ibid.*
[189] Atiyah (n.81), 56.
[190] *Ibid.*, 62.

pragmatic development of a common law remedy, with the courts being prepared "in an appropriate case to fill much of the lacuna left by the disappearance of the *parens patriae* jurisdiction by granting something approaching an advisory jurisdiction."[191] Faced with *ex ante* applications made by medical practitioners and organisations asking the courts to determine the legality of a proposed form of treatment or care[192] in order to avoid the risk of possible future civil or criminal proceedings,[193] the courts, by initially determining such applications and granting declaratory relief,[194] and subsequently by issuing practice directions to regulate how such applications are made,[195] have recognised that, in the area of medical law, difficult questions of law may arise which are inextricably linked to important issues of medical ethics,[196] and that it is in the interests of all concerned in the provision of medical treatment that the courts do determine such questions when they are asked to do so. First, because not to give guidance in such circumstances might place doctors in the invidious position of having to choose between acting in breach of their professional code of ethics or risking a criminal prosecution or civil action being brought against them,[197] and second, because otherwise medical practitioners may be reluctant or

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[191] *In Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1 (CA), Millett LJ, 21-22.
[192] Or in relation to the withdrawal of care: *c.f. Airedale NHS Trust* v. *Bland* ("*Bland*") [1993] 1 All ER 821.
[193] See Pt II below re the development of the declaratory jurisdiction.
[194] *Royal College of Nursing* v. *DHSS* [1981] AC 800.
[195] *E.g Practice Note (Official Solicitor: declaratory proceedings: medical and welfare decisions for adults who lack capacity)* [2001] 2 FCR 569, superseded by *Practice Note: (Official Solicitor: Declaratory Proceedings: Medical and welfare decisions for adults who lack capacity)* (2006), 28th July, http://www.officialsolicitor.gov.uk/docs/PracNoteMedicalandWelfareDecisions.doc (accessed 01/04/2007). In relation to applications under the MCA, the relevant guidance is now to be found in the Court of Protection Rules 2007, Part 9, and Court of Protection Practice Direction 9E, *Applications relating to serious medical treatment* (http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/court-of-protection/).
[196] *C.f.* Lord Woolf , "Are the Courts Excessively Deferential to the Medical Profession?" (2001) 9 *Med L Rev.*1, 11; *Bland*, Lord Browne-Wilkinson, 877-880
[197] *Bland*, Lord Goff, 865:

> It would, in my opinion be a deplorable state of affairs if no authoritative guidance could be given to the medical profession in a case such as the present, so that a doctor could be compelled either

refuse to provide certain medical treatment and it is in the interests of both the patient and in the public interest that such treatment be given to those that require it.[198] It may be seen as a strength of the common law that it is able to devise new or develop existing remedies to deal reasonably swiftly with difficulties such as these.[199]

The pragmatic emphasis upon remedies as a means of effective problem-solving may, however, lead to two difficulties. First, it may, particularly in the light of the emphasis upon the facts of a case, mean that inadequate attention is paid by the courts to an analysis of the issues (including doctrinal issues) in the case and that the courts fail properly to consider the theoretical underpinnings of remedies: failing to consider what purpose a remedy is designed to achieve, or its limits.[200] This may lead to a failure to develop a coherent body of legal doctrine and to a lack of clarity in the law. The second objection is that, by focusing upon remedies, the pragmatic approach pays insufficient attention to the rights of the parties. Dworkin, who is highly critical of pragmatism as a conception of law,[201] and who rejects the assumption that pragmatism provides the best

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to act contrary to the principles of medical ethics established by his professional body or to risk a prosecution for murder.

C.f. Lord Browne-Wilkinson, 880; *Re F*, Lord Bridge, 52. Lord Brandon stated that: "The common law would be seriously defective if it failed to provide a solution to the problem created by such inability to consent", 55.

[198] *Re F*, Lord Griffiths, 69; Lord Jauncey , 83.

[199] *C.f.* Atiyah (n.81), 64-65.

[200] *Ibid.*, 113.

[201] Dworkin (1986), (n,.1) ch. 5; "Pragmatism, Right Answers and True Banality", in Brint and Weaver, (n.23), 359-388. *C.f.* M.J. Radin, "The Pragmatist and the Feminist", (1989-1990) 63 *S Cal L Rev* 1699, 1722, who argues that Dworkin is a "pragmatist of sorts", through his "commitment to the ubiquity of interpretation, and his concomitant commitment to finding meaning in assembling concrete events…rather than to measuring correspondence with abstract truth or justice." Whilst pragmatism is usually regarded as being at attitude or approach, rather than a specific doctrine, and may be regarded as incorporating a wide range of beliefs (above, 3-5), it is difficult to regard Dworkin as a pragmatist within the mainstream interpretation of the term and Dworkin, given his fundamental objections to pragmatism, would not regard himself as a pragmatist.

explanation of how judges decide cases,[202] is particularly critical of what he sees to be pragmatism's failure to take legal rights seriously:

> It rejects what other conceptions of the law accept: that people can have distinctly legal rights as trumps over what would otherwise be the best future properly understood. According to pragmatism what we call legal rights are only the servants of the best future: they are instruments we construct for that purpose and have no independent force or ground.[203]

I suggest that this criticism has some force when one is considering medical law, in particular, the cases in which necessity or best interests have been used to justify treatment without consent. Although medical law has been described by Kennedy and Grubb as being "a subset of human rights law",[204] an examination of the case law[205] discloses that, in reaching pragmatic decisions based upon the facts of the case, there is a tendency for the courts either to side-step or to fail to pay adequate regard to patients' rights. For example, in *Re A*,[206] the question of Mary's "right to life" pursuant to Article 2 of the European Convention of Human Rights ("ECHR") was not properly addressed by the Court of Appeal;[207] whilst in the 'sterilisation cases',[208] difficult questions about

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[202] Regarding his conception of "Law as integrity" as providing the best interpretation of what lawyers and judges do: See Dworkin (1986), (n.1), 94-5, 161, ch.7. For a brief criticism of Dworkin's approach in relation to judicial decision making, see *e.g.* S. Lee (n.1), ch. 3.

[203] Dworkin, *ibid*., 160. *C.f.* Atiyah (n.81), 112-118. Sullivan (n.20, 25-31) argues that a pragmatic theory of rights can be constructed in which rights are not merely treated as "trumps", but play a larger role in the pragmatic scheme. His approach, which relies upon Dewey's conception of community and democracy (which regards all social institutions as having the purpose of setting free and developing "the capacities of human individuals without respect to race, sex, class or economic status"), sees community and individual goals not as being in competition, but as being the same, and rights not as being merely instrumental in attaining the best future, but as being part of a better future:

> For pragmatists, the realness of rights is a function of trying to understand rights in the context in which they emerge while also considering the impact of our present understanding on the way we will live together in the future. (31)

[204] I. Kennedy and A. Grubb, *Medical Law*, 3rd edn. (2000) 3.

[205] See *e.g.* E. Wicks, "The Greater Good? Issues of proportionality and democracy in the doctrine of necessity as applied in *Re A*" [2002] 32 *CLWR* 15.

[206] [2000] 4 All ER 961.

[207] *Ibid.*, Ward LJ, 1017-1018; Brooke LJ, 1050 and Robert Walker LJ, 1067-1068. *C.f.* Wicks (n.205).

[208] See *e.g. Re F* and the cases discussed in Ch. 7. *C.f. Local Authority X* v. *MM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443..

possible abuse and the right of incapacitated adults to have a private sexual life or to reproduce have been avoided.[209]

[209] *C.f.* S. Lee (n.1), 108.

Chapter 2

Pragmatic Decision-Making and Common Sense

Adopting a pragmatic approach to decision-making may affect both the tone and content of judgments. In particular, it is seen to be a desirable feature of pragmatic decision-making that it should accord with common sense.[1] What, then, do we mean when we speak of common sense? It has been suggested by Coady that defining this phrase is an impossible task: "It seems likely that common sense defies definition; certainly no one has succeeded in giving a satisfactory definition, and very few have tried."[2] Certainly, common sense is a notion which is difficult to pin down or define, largely because we tend to assume that we know what it is, rather than seeking to analyse what it amounts to.[3] Originally, common sense was seen to be, quite literally, a "common" sense, a centre in which impressions received from the five senses met and were formed into a common, coherent consciousness.[4] This meaning is no longer what we understand when we speak of "common sense" in everyday parlance today and, whilst recognising the difficulty of achieving any satisfactory comprehensive definition, I would suggest that, as a phrase, "common sense" may be seen to have layers of meaning. At its most basic, it may be taken to mean average understanding: "the plain wisdom which is

[1] P.S.Atiyah, *Pragmatism and Theory in English Law* (1987), 80.
[2] C.A.J. Coady, "common sense", *The Oxford Companion to Philosophy* (2005) http://www.oxfordreference.com (accessed 30.06.2006); *c.f.* S. Friedland, "On Common Sense and The Evaluation of Witness Credibility" [1989-1990] *Case W Res L* 165, 176.
[3] C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (1983), 77.
[4] S. Blackburn, *The Oxford Dictionary of Philosophy* (1996) Oxford Reference Online, http://www.oxfordreference.com. *C.f.* R. L. Gregory, *The Oxford Companion to the Mind*, (1987), Oxford Reference Online, http://www.oxfordreference.com.

everyone's inheritance".[5] Implicit in such a definition is the notion of common sense being "untutored": "…what the plain man thinks when sheltered from the vain sophistications of schoolmen…". [6]

An anti-intellectual streak may be detected here, the notion that "plain" common sense is to be preferred over "fancy" intellectual reasoning.[7] However, I would suggest that the more usual interpretation of common sense connotes something more than this, as Ryle has noted:

> …common sense…has its usual connotation of a particular kind and degree of untutored judiciousness in coping with slightly out of the way, practical contingencies. I do not exhibit common sense or the lack of it in using a knife and fork. I do in dealing with a plausible beggar or with a mechanical breakdown when I have not got the proper tools.[8]

Usually, when we speak of common sense, we mean "good, sound, practical sense",[9] generally with the implication that it is the "general sense, feeling or judgment"[10] of the community. This interpretation carries with it not merely the notion of an attitude or opinion having a "grounding" in majority community values, but also implies positive qualitative attributes. Using our common sense in making decisions and acting involves a certain level of understanding of the behaviour of individuals and institutions and being able to foresee and take into account the results of our decisions and actions:[11] common

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[5] Oxford English Dictionary Online, www.OED.com . *C.f.* Friedland (n.2): "This definition does not shed much light on the subject".
[6] Geertz (n.3), 77.
[7] P.S.Atiyah, *Pragmatism and Theory in English Law* (1987),138. *C.f.* M. Moran, *Rethinking the Reasonable Person* (2003), 158-159.
[8] G. Ryle, *Dilemmas* (1954), p.3.
[9] Oxford English Dictionary Online, (n.5).
[10] *Ibid.*
[11] M. MacCrimmon, "What is "Common" About Common Sense?: Cautionary Tales for Travelers Crossing Disciplinary Boundaries" [2001] 22 *Cardozo L Rev* 1433, 1434. See *e.g.* the following passage from S. Pinker, *How The Mind Works* (1997), 13-14 (cited by MacCrimmon at 1433-4):

sense is a useful tool to help us understand the way that our society works and to help us make good, sound, practical decisions in our life.[12]

However, even this attempt at a definition is not really adequate when one is dealing with specialised disciplines such as medicine and the law. As Maher has noted,[13] a distinction has to be made between basic, or what he terms "popular"[14] common sense and the sort of specialised or "technical"[15] common sense which exists within a discipline such as the law: "what every lawyer knows".[16] Judges, in deciding cases, are expected to demonstrate more than popular common sense. They are, when reaching their decisions, required to exercise popular common sense: to be "in touch" with community views and values when interpreting the facts and considering which legal principles to apply and how far the law ought to extend. They are also expected to have a high degree of technical common sense:[17] to have a good understanding of the applicable law and how the relevant principles ought to be applied in practice.

> You know when Irving puts the dog in the car, it is no longer in the yard. When Edna goes to church her head goes with her. If Doug is in the house, he must have gone in through some opening unless he was born there and never left. If Sheila is alive at 9am. And is alive at 5pm., she was also alive at noon. Zebras in the wild never wear underwear.....a match gives light; a saw cuts wood...But we laugh at the man who lights a match to peer into a fuel tank, or who saws off the limb he is sitting on.

[12] *Ibid*. *C.f*. F.K.H. Maher, "Common Sense and Law" [1972] 8 *Melb U L Rev* 587, 601-602.
[13] *Ibid*., 599-600.
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid*, 599. *C.f*. the discussion re casuistry below, 87-89.
[17] *E.g*. the DCA, in a guide for applicants for the post of Recorder in 2005, stated that the applicants would be expected to:

> (i) demonstrate a good understanding of legal principles and concepts, including human rights principles;
> (ii) have thorough legal knowledge and be experienced in their own area of practice; and
> (iii) demonstrate an appropriate level of expertise in his/hes chosen professional area.

DCA, "Guide for Applicants", Recorder Competition 2005/2006 London and South East Regions (http://www.dca.gov.uk/judicial/appointments/rec0506/recse0506appguide.htm).

Irrespective of which of these interpretations of common sense is preferred, I would suggest that common sense is generally seen as being a desirable attribute and as carrying a certain amount of authority.[18] Even a cursory study of references made to "common sense" in English case law lends support to such a view.[19] In cases where common sense is expressly referred to during the course of a judgment, it is almost always invoked to support the decision made.[20] In particular, common sense may be prayed in aid when judges wish to depart from logic or settled principle:[21] where there is a tension between common sense and principle, judges appear to prefer the former and to conclude that "the law embodies common sense".[22] The former Law Lord, Lord Reid, lent his support to this approach when he stated that judges: "…should…have regard to

[18] *C.f.* Maher (n.12), 594. An exception needs to be made when one is considering certain philosophical views. Although there is a long history of philosophers according respect to the "ordinary man" and common sense as a "guide to the discovery of truth" (*ibid*., 589), dating back to Aristotle, and including philosophers from the Scottish School of Common Sense (Reid and Stewart) and G.E. Moore, generally common sense has not been treated with much respect by philosophers (See F. Ayer, *Metaphysics and Common Sense* (1969), 64). As Maher notes, this may be because "common sense philosophies "go against the grain" of much philosophical thought, which sets out theories in relation to thought and conduct which rely on ratiocination rather than general intuitions (592). A detailed study of common sense as a philosophy is beyond the scope of this thesis, but for a brief analysis see Maher (n.12), 591-595; R. J. Allen, "Common Sense, Rationality and the Legal Process" [2001] 22 *Cardozo L Rev* 1471.

[19] See *e.g.* Westlaw UK (http://www.westlaw.co.uk : accessed 07.07.2009), where a search for the term "common sense" disclosed more than 400 UK cases in which common sense was specifically referred to in the judgment or the court took an approach subsequently identified by commentators as being a "common sense" one (See *e.g. Richardson* v. *U Mole Ltd* [2005] ICR 1664 and the case commentary at (2005) 11(3) TELL 120).

[20] Atiyah (n.7), 80-81. For some examples of this, see: *R* v. *Sparks (Alan John)* [2003] EWCA Crim 3373; *Southwark L.B.C.* v. *Adelekin* [2005] 10 CL 273; *Hilton* v. *Barker Booth & Eastwood* [2005] 1 WLR 567; *Secretary of State for Work and Pensions* v. W [2005] EWCA Civ 570. *C.f. Chester* v. *Afshar* [2005] 1 AC 134.

[21] *C.f.* Moran (n.7), 158.

[22] E.W. Thomas, *The Judicial Process* (2005), 335. See *e.g. R* v. *Majewski* [1977] AC 443, Lord Salmon, 482: "…this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic." *c.f. R* v. *Powell, English* [1999] 1 AC 1, Lord Hutton, 25.

common sense, legal principle and public policy in that order".[23] Certainly, as Thomas has noted, "no judge ever suggests that he or she lacks common sense".[24]

Having stated that common sense is regarded as having a certain authority, one must now consider why that is the case. Geertz has suggested that this is based upon the unspoken assertion that it "presents reality neat",[25] that common sense may be seen to be "the simple truth of things artlessly apprehended; plain fact acknowledged by plain men".[26] However, Geertz recognizes that to see common sense as a representation of "the way things are" is an oversimplification. Common sense is not merely the truth "neat", but an interpretation of "the immediacies of experience"[27] and, as such, needs to be situated in its social and historical setting:

> …it is…historically constructed and…subjected to historically defined standards of judgement. It can be questioned, disputed, affirmed, developed, formalized, contemplated, even taught, and it can vary dramatically from one people to the next.[28]

A matter which is regarded as common sense today might be regarded as one of the "follies of our age"[29] in future years. A study of history serves to remind us of that. As Quine and Ullian have observed, once it was thought to be common sense that man could

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[23] Lord Reid, "The Judge as Law Maker" [1972] 12 *JSPTL* 22, 25.
[24] Thomas (n.22), 335. *C.f.* the bizarre 1957 case of *Thorp* v. *King Bros. (Dorking) Ltd* discussed in R.E. Megarry, *A New Miscellany-at-Law* (2005), 294-295. This could also be said of people in general. As Descartes commented: "Common sense is the best distributed commodity in the world, for every man is convinced that he is well supplied with it", *Les Discours de la Méthode* (1637) part 1; quoted in: E. Knowles (ed.), *The Concise Oxford Dictionary of Quotations* (2003), Oxford Reference Online (n.5).
[25] (n.3), 76.
[26] *Ibid*., 10. *C.f.* J. Bruner, who describes "folk psychology" or "common sense" as: "…a system by which people organise their experience in, knowledge about, and transactions with the social world.": *Acts of Meaning* (1990), 35.
[27] Geertz (n.3), 76.
[28] *Ibid. c.f.* W. Twining, "Civilians Don't Try: A Comment on Mirjan Damška's 'Rational and Irrational Proof Revisited'" [1997] 5 *Cardozo J Int'l & Comp L* 69.

not fly, now manned flight is commonplace,[30] and this is not an isolated example: history shows us that, in due course much of what we today hold to be the common truth will in due course be shown to be false and will be rejected.[31] The same may also be said of the "technical" common sense used by those involved in legal practice: the common sense of the High Court in the twenty-first century is not that of an "Anglo-Saxon folk-moot".[32] For example, the law's treatment of those who lack capacity or who suffer from mental disorder has changed over time as societal attitudes have changed.[33] This change in attitude is reflected in the terminology used in legislation relating to the mentally disordered over the past century: from the Mental Deficiency Acts 1913 and 1927,[34] which define the mentally disordered in terms which would today be generally regarded as being unacceptable derogatory and emotive, such as "mentally defective",[35] "idiots",[36] "imbeciles"[37] and "feeble-minded persons",[38] to the use of more neutral terminology such as "mental disorder"[39] and "a person who lacks capacity"[40] in the Mental Health Act 1983 and Mental Capacity Act 2005. Since common sense is culturally constructed and subject to change, it appears that the "authority'" which it is seen to have derives not merely from the fact that it is the "simple truth", but also because people believe that common sense is a valid and valuable concept: "things are what you make of them."[41]

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[30] *Ibid.*
[31] *Ibid.*
[32] Maher (n.12), 605.
[33] See *e.g* P. Fennell, *Treatment Without Consent: Law, psychiatry and the treatment of mentally disordered people since 1845*, (1996).
[34] The 1927 Act amends the 1913 Act. In particular, it amends the definitions of the classes of person deemed to be mentally defective (Mental Deficiency Act 1927 (MDA 1927, s.1).
[35] Mental Deficiency Act 1913 (MDA 1913), s.1.
[36] MDA 1913, s.1(a), amended by the MDA 1927, s.1(1).
[37] MDA 1913, s.1(b), amended by the MDA 1927, s.1(1).
[38] MDA 1913, s.1(c), amended by the MDA 1927, s.1(1).
[39] Mental Health Act 1983 (MHA 1983), s.1.
[40] MCA, s.1(2).
[41] Geertz (n.3), 76.

Judges and Common Sense

I have already referred to the tendency of judges ultimately to prefer common sense over principle where there is a clash between the two.[42] This might be attributed to judges sharing in the common acceptance of the value of common sense in making decisions, but I would suggest that it is linked to the judge's view of their function as "public servants" and their awareness of their status in society. As Thomas has noted, "common sense is a great leveller":[43] the "man on the Clapham Omnibus" may not feel that he is able to assess a judge's legal abilities, but he is likely to be able to reach an opinion as to whether the judge has acted in accordance with common sense. So whereas:

> Judges, or some judges, may raise the mystique of the law or formalism to shield them from criticism that they have been unjust or out of date, but they cannot hide behind that mystique or formalism to protect themselves from the charge of lacking common sense.[44]

If a judge's ruling is perceived as not being in accordance with common sense, then there is a risk that it will be said that "the law is an ass",[45] and that the judge who has made the particular ruling will be held up to public ridicule.

Judges know that if they err, they run the risk of being overturned on appeal and criticised by practising or academic lawyers, members of the public and the press. Experience has shown that the press, in particular, can be particularly scathing of judicial decisions which can be seen to be contrary to common sense. An example of this may be

[42] Above, 58-59.
[43] Thomas (n.22), 336.
[44] *Ibid.*
[45] See. Lord Reid (n.23), 25 and Thomas (n.22), 336.

found in the press coverage which followed the House of Lords decision in *Attorney-General v. Guardian Newspapers Ltd (No 1),*[46] the culmination of the first round of the "Spycatcher" litigation. When the House of Lords, by a majority of 3:2, dismissed the newspapers' appeals and granted an injunction forbidding the reporting of allegations against MI5 officers contained in the 'Spycatcher' book (even though the book was widely available abroad and individuals could bring foreign copies into the UK)[47] as well as banning the reporting of allegations made in open court in Australia during the course of similar injunction proceedings,[48] the press in general heaped criticism upon the majority judges,[49] with the Daily Mirror in particular running a front-page headline which read: "You Fools", accompanied by upside-down photographs of the Law Lords who had supported the ban.[50] Judges are aware of how they are perceived, both by fellow judges[51] and by the wider public. We now have what may be regarded as a trained judiciary, since all full and part time Crown, County and High Court judges receive induction training and continuing professional education and attend regular training courses.[52] Through this

[46] [1987] 1 WLR 1248.
[47] See S.Lee, *Judging Judges* (1986), Ch.11,
[48] *C.f.* the views of Sir Nicholas Browne-Wilkinson VC in the Chancery Division who refused to grant an injunction, stating (1270-1271):

> Once the news is out by publication in the United States and the importation of the book into this country, the law could, I think be justifiably accused of being an ass and brought into disrepute if it closed its eyes to that reality and sought by injunction to prevent the press or anyone else from repeating information which is now freely available to all.

[49] See *e.g.* The Times, (1987) July 31, which included the following quotations:

> "It defies all common sense", Neil Kinnock.
> "…with the book freely available they are senselessly making fools of themselves at home and abroad.", David Steele.

[50] The Daily Mirror (1987) July 31.
[51] *E.g.* Judges of first instance trials are sent a copy of the judgment in the case of successful appeals against their rulings.
[52] Judges receive initial training following their appointment, are required to undergo continuing professional education and are provided with training programmes in relation to major changes to legislation and the administration of justice. On the 1st April 2011 the work of the Judicial Studies Board, which had previously been responsible for judicial education, was transferred to the newly created judicial college: http://www.judiciary.gov.uk/training-support/judicial-college ; *c.f.* Justice, *The Judiciary in England and Wales* (1992), 7-8.

training and Judicial Studies Board and Judicial College publications, judges are made aware (if their own experience had not already made them aware) that they are under "ever increasing public scrutiny",[53] and need to watch their step.

The desire to avoid criticism and public ridicule is not, however, the only motivating factor behind the preference for a common sense approach being adopted when decisions are being made. Judges are "public servants" and I suggest that judges, by virtue of their selection, appointment and training, are made aware of their role as "public servants". This awareness has two principal effects upon judges' decisions. The first relates to the manner in which judges express themselves when giving judgment. Where possible, their decisions ought to be capable of being understood (at least in broad terms) by the "man in the street":

> We are here to serve the public, the common ordinary reasonable man. He has no great faith in theories and he is quite right. What he wants and will appreciate is an explanation in simple terms which he can understand. Technicalities and jargon are all very well among ourselves - a system of shorthand- but in the end if you cannot explain your result in simple English there is probably something wrong with it. [54]

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[53] Mrs. Justice Cox, *Equal Treatment Bench Book* (2004), Foreword, Judicial Studies Board, *Ibid*. *C.f.* Lord Woolf, "Current Challenges in Judging" (2003), Speech to 5th Worldwide Common Law Judiciary Conference, 9, (http://www.dca.gov.uk). The public and press can be particularly critical of judges who are seen to pass over-lenient sentences upon sexual or violent offenders, see *e.g.* the criticism heaped upon the former circuit judge John Gower following the disclosure that he had sentenced Sarah Payne's killer, Roy Whiting to a term of four years' imprisonment for an earlier sex attack upon a girl in 1995 and the retired judge's comment that he had "no regrets" about his sentence. In "The Big Issue" letters page in the Sun newspaper (December 21, 2001), under the headline, "Sarah Payne Might Be Alive Now But For Judge", the former judge was described as being "…the man who could have prevented the murder of Sarah Payne…With judges like Gower, is it any wonder people have no faith in the judiciary or British justice?", "an old duffer", "stupid", "out of touch with the world" and "completely out of touch with public opinion". *C.f.* K. Raymond, "Soft Life and Crimes of the Lenient Judges" (2006) *Sunday Times*, January 15. The tabloid press are not above "door-stepping" judges in such cases and asking them to justify their conduct.

[54] Lord Reid (n.23), 25. *C.f. Smith* v. *Harris* [1939] 3 All ER 960, Lord Du Parcq, 967:

> "If an argument has to be put in terms which only a schoolman could understand, then I am always very doubtful whether it can be expressing the common law."

The second relates to the content and the potential outcome of decisions- the view that they ought, where possible, to reflect the views of "the common ordinary reasonable man". Lord Devlin has referred to this as the "consensus"[55] in the community: "those ideas which its members as a whole like or, if they dislike, will submit to".[56] Common sense may act as a useful resource for judges to rely upon when reaching their decisions, particularly in cases involving complex technical issues where the adjudicator lacks relevant expertise, in which case a judge may draw upon common sense to steer her towards what she sees as being the most appropriate judgment. It may also be seen to operate as a constraint upon judicial behaviour, particularly in cases where the courts are forced to move away from a consideration of legal material (legislation, cases, pleadings and the like) to consider wider issues such as morality or policy.[57] For example, Lord Devlin has suggested that judicial activism in making law which is based upon the views of the consensus is acceptable,[58] but that what he terms "dynamic or creative lawmaking"[59], which "is the use of the law to generate change in the consensus",[60] is not: "a judge who is in any doubt about the support of the consensus should not advance at all."[61] In the context of medical law, where courts have to consider not merely matters of law, but also "moral, ethical, medical and practical issues of fundamental importance to society",[62] the House of Lords has recognised that, where principles are to be applied, the views of society ought to be respected: "The judges' function in this area of the law should be to apply the principles which society, through the democratic process, adopts,

[55] Lord Devlin, "Judges and Lawmakers" [1976] 39 *MLR* 1, 2.
[56] *Ibid.*
[57] *C.f.* M.M. Feeley and E.L. Rubin, *Judicial Policy Making and the Modern State*, (1999), 219
[58] Above (n.55), 4-5.
[59] *Ibid.*, 2.
[60] *Ibid.*
[61] *Ibid*., 8.
[62] *Bland* [1993] AC 789, Lord Browne-Wilkinson, 877

not to impose their standards on society."[63] Although it has also recognised that, in cases where "society as a whole is substantially divided on the relevant moral issues"[64] and there is legislation governing the subject-matter under consideration, decisions made by judges which "seek to develop new law to regulate the new circumstances…will of necessity reflect the individual judges' moral stance".[65]

If the law is to reflect these reasonable views of the community, it follows that it must be able, where appropriate, to change as these attitudes change,[66] and this too, may be seen a feature and a strength of the "common sense" approach. Lord Donaldson recognised this, in a medical law context, in his Court of Appeal judgment in *Re F*:[67]

> …it is a feature of that law[68] that it marches with and adapts to sea changes in the attitudes of reasonable people as a whole. Put slightly differently, but I hope not inaccurately, the common law is common sense in a wig.

The common sense approach may be seen as keeping the law in touch with societal attitudes and change.

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[63] *Ibid*, 879.
[64] *Ibid.*
[65] *Ibid.*
[66] Thomas (n.22), 307.
[67] [1990] 2 AC 1, 17. *Cf. McFarlane* v. *Tayside Health Board* [2000] 2 AC 59, Lord Steyn, 82:
> …judges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right.

[68] *I.e*. The common law.

Common sense and pragmatism: links, limitations and problems

It is unsurprising that common sense and pragmatism are linked, since the two have much in common, as Thomas has noted:

> It is alien to common sense to proceed in a way which is divorced from reality, and common sense is wholly comfortable about proceeding in a pragmatic fashion having regard to the consequences of the court's ruling. Common sense, in other words, goes hand in glove with realism and pragmatism.[69]

Both are more concerned with outcome than with strict adherence to principle. Both place their emphasis upon reality and adopt a somewhat anti-academic tone, rejecting theory for the sake of theory. There are, however, a number of criticisms to be made both of common sense and of the pragmatic approach which relies upon it.

Common sense has its limitations, and it needs to be recognised that, as a tool in pragmatic decision-making, it has significant weaknesses. I have referred to the fact that it is a highly nebulous concept, which is difficult to define,[70] and which most, if not all people believe that they possess.[71] Since it is a concept which is easy to lay claim to, but difficult to substantiate, and which may mean very different things to different people, one must question just how helpful a guide it is in the context of theories about decision-making. For example, Dworkin has claimed that his thesis that there is one right answer in hard cases, [72] embedded in "grounds of principle, not policy",[73] is "a very weak and

[69] (n.22), 337. *C.f* Rorty, who has suggested that: "Pragmatism was reasonably shocking seventy years ago, but in the ensuing decades it has gradually been absorbed into American common sense.": R. Rorty, *Consequences of Pragmatism* (1982), 90.
[70] Above, 55-57.
[71] Above, 59.
[72] Dworkin: *A Matter of Principle* (1985), Ch. 5; *Law's Empire* (1986) Ch.7.
[73] Dworkin (1986), (n.72), 244.

commonsense legal claim…made within legal practice rather than at some supposedly removed, external philosophical level".[74] Yet Dworkin's account of what judges may call upon in deciding hard cases, appears not to be accepted by most judges as reflecting reality or a "common sense" approach: "few, if any, judges today think that there is a 'right' answer to any legal problem",[75] and it appears to be almost universally accepted that judges do consider policy when deciding cases, particularly in the context of administrative law and tort.[76]

Even if one accepts common sense as being the view of the "man on the Clapham omnibus", or a form of "consensus" approach, it is not a universal panacea and alone may not provide the right, or even a satisfactory answer.[77] First, the notion of common sense being the view of the ordinary, reasonable man comes increasingly under strain in a modern, diverse society, where 'known and shared values'[78] may be difficult to ascertain or may not exist. This difficulty was recognised by Lord Hope in *Chester v. Afshar*:

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[74] See: "Pragmatism, Right Answers and True Banality" (1986), (n.72), 365-366; *Justice in Robes* (2006), 41.

[75] Thomas (n.22), 45; *c.f.* 189. S. Lee, *Judging Judges* (1988), 131

[76] *E.g.*: Thomas, *ibid*., 5, 197; T. Bingham, *The Business of Judging* (2000) 28; Reid (n.23), 25; *Dutton* v. *Bognor Regis UDC* [1972] 1 QB 373, 397; *Fairchild* v. *Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, Lord Bingham, [33], Lord Nicholls, [40]-[43]. Lord Scarman appears to be a notable exception to this general approach, since in a series of judgments he has adopted a Dworkinian approach, based upon principle rather than policy: *e.g. Sidaway* v. *Board of Governors of the Bethlem Royal Hospital* [1985] AC 871, 887; *Gillick* [1986] AC 112, 182-187; although Lee has suggested that Lord Scarman is subject "to the Dworkinian fault of concealing implicit policy options in an explicit discussion of principle" (n.75), 161.

[77] *C.f. Chester* v. *Afshar* [2005] 1 AC 134, Lord Hope of Craighead, para. [82], 161; N. MacCormick, *Legal Reasoning and Legal Theory* (1978), 195.

[78] See G. Williams, *Textbook of Criminal Law* (1983), (2nd edn.), 725-726, where he is critical of the practice of treating the concept of "dishonesty" as "an ordinary word which must be left to the jury to interpret…according to 'the current standards of ordinary decent people'" , since, in a society which is not homogenous and where disrespect for property rights is widespread, a jury may "fail to achieve unanimity or near-unanimity except upon a standard lower than the average." In such a scenario, as Alan Norrie has stated: "the standard of the reasonable and honest person is up for grabs": *Crime Reason and History*, 2nd edn. (2001), 43.

> On its own common sense, and without more guidance, is no more reliable as a guide to the right answer in this case than an appeal to the views of the traveller on the London Underground. As I survey my fellow passengers on my twice weekly journeys to and from Heathrow Airport on the Piccadilly Line- such a variety in age, race, nationality and languages- I find it increasingly hard to persuade myself that any one view on anything other than the most basic issues can be typical of any of them.[79]

The invocation of common sense in such circumstances may be seen to be more a matter of rhetoric than a reflection of reality:[80] "Sense is anything but common in the context of a plural society".[81] Further, it must be questioned whether a consensus view exists in 'hard cases', particularly in cases in which judges have to struggle with difficult issues of medical ethics.[82] This was recognised by Ward LJ in relation to the conjoined twins case, *Re A*[83] when, prior to giving judgment in the case, he spoke to the BBC and, rather than

[79] [2005] 1 AC 134 [83]-[84], "*Chester*". In the case the defendant was a neurosurgeon who advised the claimant to undergo surgery upon her spine. The claimant was not warned that the operation carried a small risk of nerve damage, which might result in paralysis. The operation itself was conducted and the claimant developed such nerve damage with some paralysis. She brought an action against the defendant in negligence. The trial judge found that the defendant had not been negligent in his conduct of the operation itself, but had been negligent in failing adequately to warn of the risks of the surgery. The judge concluded that, had the defendant known of the risks involved, she would have sought advice as to possible alternative treatments to her condition and the operation would not have taken place when it did, but he did not find that the claimant would, in such circumstances, never have had the operation. It was held that there was a sufficient causal link between the defendant's failure to warn of the risks and the damage suffered, that the causal link was not broken by the possibility that she might, in any event, have consented to the surgery in the future and that the defendant was liable in damages. His appeal to the Court of Appeal having been dismissed, the defendant appealed to the House of Lords, who by a majority (3:2) decided that the issue of causation was to be addressed with regard to the scope of the defendant's duty to give appropriate warning as to the dangers or disadvantages of surgery. As a result of the surgeon's failure properly to warn her, Miss Chester could not be said to have given informed consent to surgery. Since the function of the law was to enable rights to be vindicated and to provide remedies where duties have been breached, her right to autonomy ought to be vindicated by a narrow modification from traditional causation principles to provide her with a remedy for the breach. E. Jackson, *Medical Law: Text, Cases and Materials*, 2nd edn.(2009), 201-205. Re causation more generally, see *e.g.* A.M. Dugdale et al. (eds.), *Clerk & Lindsell on Torts* (2006), 19th edn, paras.2-03-2-05; *c.f.* H.L.A. Hart and A.M. Honoré, *Causation in the Law*, 2nd edn. (1985).
[80] R. Ballard, "Common Law and Uncommon Sense: the assessment of 'reasonable behaviour' in a plural society", (1999), Paper, http://www.art.man.ac.uk/CASAS/pages/papers.htm. , 14. *C.f.* Moran (n.7), 157-163.
[81] Ballard (n.80).
[82] Lee (n.1), 138, 85. This may also be said in relation to issues of law and morality, including sexual morality: *C.f.* H.L.A. Hart, *Law, Liberty and Morality* (1964).
[83] *Re A (Children)(Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961.

taking refuge in any claimed consensus approach, admitted that the task faced by the court had been "excruciatingly difficult".[84]

The limitations of common sense as a basis for judicial decision-making do not, however, end here. As Lord Hoffman noted in *Chester*:

> …there is sometimes a tendency to appeal to commonsense to avoid having to explain one's reasons. It suggests that causal requirements are a matter of incommunicable judicial instinct.[85]

A judge may highlight a conflict between common sense and legal principle and use common sense as a device both to avoid having to give reasons and to divert attention from the fact that the usual requirement for a judgment to be reasoned has been side-stepped.[86] If this is the case, common sense is sometimes being used as a 'cover' for intellectual laziness, and I would suggest that this is clearly undesirable. Posner has suggested that intellectual laziness is the "greatest danger" of judicial pragmatism, since "it is a lot simpler to react to a case than to analyze it".[87] However, potentially the difficulties may be even greater, since there is scope for a lazy judge, or perhaps even a busy judge who is short of time, to invoke 'common sense' rather than taking the time to study the facts of the case in any detail,[88] let alone properly to analyse the issues in the case, relying instead upon an intuitive 'broad brush' approach.[89] A good deal of actual or perceived judicial inadequacy may be concealed beneath a 'dollop' of common sense.[90]

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[84] F. Gibb (2000) *Times*, September 23.
[85] *Chester* (n.79), [55].
[86] Lord Hoffman, "Common Sense and Causing Loss" (1999), Lecture to the Chancery Bar Association, 15th June.
[87] R.A. Posner, *The Problematics of Legal and Moral Theory* (1999), 262.
[88] Atiyah (n.7),136.
[89] *Ibid*., 141-142.
[90] Thomas (n.22), 335.

Common sense ought not to be "a refuge for sloppy thinking".[91] A judge, even a pragmatic judge, ought properly to analyse the evidence and consider the relevant legal material and submissions before reaching her reasoned conclusions.[92]

Common sense, pragmatism and error

The use of common sense in judicial decision-making may also introduce error, bias and prejudice into the decision-making process. I have previously stressed the importance of the fact-finding process in our common law system.[93] In the course of our lives, we regularly make decisions about facts and, in making such determinations, rely upon what Twining has described as our "stock of knowledge":

> …ill-defined agglomerations of beliefs which typically consist of a complex soup of well-grounded information, sophisticated models, anecdotal memories, impressions, stories, myths, wishes, stereotypes, speculations and prejudices.[94]

The reliance upon our stock of knowledge is part and parcel of common sense decision making. For example, when making a decision as to whether a person is telling the truth we are likely to draw upon our past experience of the way in which our world works to reach a conclusion as to credibility.[95] As part of this process, we may take into account matters such as the way the witness looks, speaks or dresses, comparing what we hear and see against information which we have received from a whole raft of sources

[91] *Ibid.*, 336.
[92] *Ibid.*
[93] Above, 27-31.
[94] Twining (n.28), 74.
[95] *C.f. Quine* and *Ullian* (n.29), 55.

including the mass media, literature, family, friends, colleagues and teachers.[96] Stories may play a part in common sense decision making first, because they form a part of our 'stock of knowledge' and second, because when assessing the truth of something which we have been told, we may consider it as a story or narrative in order to help us decide what is true and what is false, drawing on previously held conceptions:

> a story is plausible to the extent that it corresponds to the decision maker's knowledge about what typically happens in the world and does not contradict that knowledge.[97]

In the context of the assessment of evidence in order to find the facts in a case, a number of problems arise. First, there is the question of accuracy. The assessment of a witness's demeanour is generally regarded to be a significant factor in deciding whether that person's evidence can be accepted as truthful, and non verbal 'cues' such as tenseness, lack of eye contact and what are perceived to be unnatural gestures may be taken to indicate that a witness is lying.[98] This view that common sense is an important tool when assessing the reliability of a witness has certainly been held in the past by members of the judiciary. As Jerome Frank stated:

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[96] *C.f.* S.I. Friedland, " On Common Sense and the Evaluation of Witness Credibility", (1989-90) 40 *Case W Res L Rev* 165, 177, in relation to jurors' assessments of credibility. The MCA, s.2 (3), specifically states that:

> A lack of capacity cannot be established merely by reference to-
> (a) a person's age or appearance, or
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

[97] N. Pennington and R. Hastie, "The Story Model for Juror Decision Making", in R. Hastie (ed.), *Inside the Juror: The Psychology of Juror Decision Making* (1993), 192-221. *C.f.* M.T. MacCrimmon, "Fact Determination: Common Sense Knowledge, Judicial Notice, and Social Science Evidence" (1998), 2-3.

[98] O.G. Wellborn III, "Demeanour, (1991) 76 *Cornell L Rev* 1075, 1078-1088.

> Lacking any adequate mechanical means of detecting such matters, the courts resort to a commonsense technique: All of us know that, in every-day life, the way a man behaves when he tells a story-his intonations, his fidgetings or composure, his yawns, the use of his eyes, his air of candour or of evasiveness- may furnish valuable clues to his reliability. [99]

However, it appears that what Gleeson has termed the "Pinocchio theory",[100] according to which the honesty of a witness may be easily discerned from her demeanour, is now treated with a good deal of scepticism by judges. For instance, Lord Bingham has stated that: "…the current tendency is (I think) on the whole to distrust the demeanour of a witness as a reliable pointer to his honesty".[101] Psychological studies of the use of common sense views to determine the credibility of witnesses suggest that such scepticism is well founded: common sense does not provide one with an accurate lie detector.[102] Nor is there any correlation between a person's confidence in their ability to detect the truth and the accuracy of their assessments of witnesses.[103] One might expect that professionals such as judges, who as part of their work have to assess whether

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[99] J. Frank, *Courts on Trial* (1949), 21. *C.f*. The Rt. Hon. Sir R. Ormrod, "Judges and the Process of Judging" (1980), Holdsworth Club, Presidential address (Cited in Bingham (n.76), 8): "Inflections in both questions and answers may be highly significant, and demeanour, not only of the witness, but of others in court may be revealing."

[100] A.M. Gleeson Q.C., "Judging the Judges" (1979) 53 *Australian Law Journal* 338, 344

[101] Bingham (n.76), 9. *C.f*. Sir B. MacKenna, "Discretion", (1974) IX *Irish Jurist* 1, 10; adopted by P. Devlin, *The Judge*, (1981), 63; The Rt. Hon. Sir Patrick Browne, "Judicial Reflections", (1982) *CLP* 1, 5. "When there is a conflict of evidence between witnesses, some judges believe that they can tell whether a witness is telling the truth by looking at him and listening to him. I seldom believed that..."

[102] See *e.g.* Friedland, (n.96); A. Kapardis, *Psychology and Law*, (2003) 2nd edn., 236-241; J.A. Blumenthal, "A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility", (1993) 72 *Neb L Rev* 1157, 1159; O.G. Wellborn III, "Demeanor" (n.98) (which reviews and summarises some of the studies in this field) and P. Ekman and M. O'Sullivan, "Who can catch a liar?" (1991) 46 *American Psycological Association* 913. Evidence obtained from some of the studies suggests that, in some circumstances, accuracy rates in relation to witness interpretations of visual demeanour alone are less than rates which would be expected if the determinations were to be made by chance: see *e.g.* G. E. Littlepage and M. A. Pineault, "Verbal, Facial and Paralinguistic Cues to the Detection of Truth and Lying" (1978) 4 *Personality & Soc Psychology Bull* 461 (summarised in Wellborn, *ibid.*, 1083-1085) . As Roberts and Zuckerman have commented: "...in other words they would do better simply to toss a coin than to rely on their supposedly well-honed instincts for nosing out the truth and seeing through deception!" (2010) *Criminal Evidence*, 299.

[103] *E.g.* Ekman and O'Sullivan (n.102).

individuals are telling the truth, might be better than ordinary citizens at detecting deception, but studies suggest that this is not the case.[104] It appears that 'common sense' expectations about how people behave when they are lying do not provide the decision-maker with sufficient specialist knowledge to be able accurately to detect lies.[105]

In medical law cases where declaratory relief is being sought, there will usually be little or no dispute about the basic facts of the case and no challenge to the veracity of witnesses whose evidence is before the court. First, this is because, as I have already stated, much of the evidence in such cases is likely to consist of expert reports and testimony.[106] Judges appear to assume that experts are not trying to mislead the court. As Bingham has observed: "Expert witnesses may be and often are partisan, argumentative and lacking in objectivity, but they are not dishonest".[107] In cases where court approval is being sought for a certain course of medical treatment, if there is a conflict between expert witnesses, the judge will have to choose between expert opinions, since there can only be one course which is in the patient's best interests.[108] In this instance, the judge will have to understand the testimony given and "form a reasoned basis for his preference",[109] and matters such as demeanour will provide little or no assistance.[110] Even where there is testimony from 'lay' witnesses, such as relatives or carers, challenge

[104] *E.g*. E. Kraut and D. Poe, "Behavioural roots of people perception: the deception judgments of customs inspectors and laymen" (1980) 39 *Journal of Personality and Social Psychology* 784; A. Vrij and F.W. Winkel, "Objective and Subjective Indicators of Deception" (1993) 20 *Issues in Criminological and Legal Psychology* 51; Ekman and O'Sullivan (n.102).
[105] Kapardis (n.102), 236. It appears that specialist training may improve accuracy rates: S. Porter, M. Woodworth and A.R. Birt, "Truth, Lies and Videotapes: and investigation of the ability of federal patrol officers to detect deception" (2000) 24 *Law and Human Behaviour* 643.
[106] Above, 34-35.
[107] Bingham (n.76), 18.
[108] *Re SL (Adult Patient)(Medical Treatment)* [2002] FLR 389.
[109] Bingham (n.76), 19.
[110] *C.f.* Above (n.102, 104).

to their evidence usually focuses upon whether the course which they propose should be followed is in the best interests of the patient, rather than upon the truthfulness of their evidence.[111]

However, 'common sense' views may be used in the assessment of evidence even where veracity is not in issue, particularly where there is dispute between expert and lay testimony. In such cases, an assessment of whether treatment (or non-treatment) is in the best interests of the patient is likely to be made against a 'back drop' of common sense views about normality in relation to matters such as mental and physical health, human behaviour and personal relationships. Such views, as Canguilhem has argued, are far from value free, and in relation to medicine, the term 'normal' may be used to designate not merely the 'average', but also the ideal state of the body, since one of the ordinary aims of therapeutic medicine is to restore the body to its habitual, ideal, 'healthy' state.[112] A common sense assessment of the evidence may disadvantage lay witnesses when they disagree with expert opinion in medical cases. First, because in a case where medical experts are stating that a certain course of medical treatment should be provided, it may be felt that it is common sense to defer to the experts, at least in relation to 'medical interests'. Second, even where veracity is not in issue, common sense views with regard to the demeanour of witnesses may mean that lay witnesses who become emotional or distressed during the course of their evidence (because they are emotionally involved in the case) are seen as being less reliable and their evidence seen as carrying less weight

[111] See *e.g Re A* [2000] 4 All ER 961.
[112] G.Canguilhem, *The Normal and the Pathological* (1991), 65, 77, 126, 238.

than that of more dispassionate expert witnesses.[113] Even if judges are now more sceptical about their abilities as lie detectors,[114] appellate courts still place value upon the trial judge's views as to the demeanour of a witness as part of the deference which they pay to the factual determinations of the judge of first instance.[115] I suggest that it is implicit in such deference is an acceptance that judges may draw valid inferences as to the credibility of a witness from his demeanour in court:

> One thing is clear, not so much as rule of law but rather as a working rule of common sense. A trial judge has, except on rare occasions, a very great advantage over an appellate Court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a Court of Appeal should never interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial Judge and the Court of Appeal has not been occasioned by any demeanour of the witnesses or truer atmosphere of the trial (which may have eluded an appellate Court)…[116]

Using one's common sense when assessing the evidence of witnesses may lead to incorrect decisions being made in relation to the facts of a case, which are still unlikely to be overturned on appeal.[117]

[113] See *e.g Re A* (2000) 57 BMLR 1, 11.
[114] Above, 71-72.
[115] Above, 28-29.
[116] *Onassis v. Vergottis* [1968] 2 Lloyd's Rep. 403, Lord Pearce, 431. *C.f. Clark v. Shaw* [1919] S.C. (H.L.) 35, Lord Shaw, 36; Bingham (n.76), 7-8.
[117] Bingham, *ibid.*

Common sense, bias and elitism.

In addition, a pragmatic reliance upon common sense may, consciously or unconsciously, introduce biased, stereotypical and elitist views into determinations. I would suggest that three factors are of particular significance in this regard.

(i) Judges as interpreters of common sense

I have discussed the concept of common sense being seen to represent the judgment of the reasonable person within a community, but when one is considering the use of common sense by judges in their judgments, it needs to be borne in mind that we are dealing with the judges' interpretations of what they understand to be community views and values.[118] Such interpretations are likely to be influenced by an individual judge's "set of attitudes",[119] so that each judge will embark upon the decision-making process with a personal history behind them which will influence the way that she views a particular matter and her ways of thinking and expressing herself.[120] These views and modes of thought and expression will be influenced by practices shared within the culture of which the judge is a part, a "personal variation on shared themes",[121] and I would

[118] MacCormick (n.77), 111.
[119] *Ibid*, 112.
[120] T. Morawetz, "Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory and Judging" (1992) 141 *University of Pennsylvania Law Review* 371, 410. *C.f.* L. Wittgenstein: "My judgments themselves characteristic the way I judge, characterize the nature of judgment": *On Certainty*, (1969), para.149, 22.
[121] Morawetz (n.120).

suggest that this history will have at least partially been shaped by her experience as a lawyer.[122]

In his work, *The Politics of the Judiciary*, Professor Griffith suggests that the higher judiciary in particular are drawn from a relatively narrow "elite" section of society:

> Typically coming from middle-class professional families, independent schools, Oxford or Cambridge, they spend twenty to twenty-five years in successful practice at the Bar, mostly in London, earning very considerable incomes by the time they reach their forties. This is not the stuff of which reformers are made, still less radicals.[123]

The judiciary may be said to be more reflective of society today than formerly, certainly to the extent that it may be said that the appointment of women and candidates from ethnic minorities has increased, particularly in recent years.[124] However, as has been recognised by the Ministry of Justice, there is still quite some way to go before the make up of the judiciary reflects the UK population.[125]

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[122] *Ibid.*

[123] J.A.G. Griffith, *The Politics of the Judiciary*, (1997), 5th edn., 338. *C.f.* the comments of Lord Devlin with regard to similar observations made by Professor Griffith re the judges of the Court of Appeal and House of Lords in an earlier edition of the work: "Judges, Governments and Politics", (1978) 41 *Mod. L.R.* 501, 505-6: "…I have little doubt…that the same might be written of most English institutions, certainly of all those which like the law are not of a nature to attract the crusading or rebellious spirit."

[124] In 2000 19.8% of all judges were women. By 2003-4 that percentage had increased to 26.3%. The percentage of minority ethnic judges increased from 3.14% in 2000 to 7.2% in 2003-2004 (http://www.dca.gov.uk/judicial/diversity/barriers/makeup).

[125] Ministry of Justice, *Improving Judicial Diversity- progress towards delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'* (2011), http://www.justice.gov.uk/publications/policy/moj/judicial-diversity-report.htm . *C.f.* DCA: (2004) "Increasing Diversity in the Judiciary", http://www.dca.gov.uk/consult/judiciary/diversitycp-25-04.pdf; (2006) "Judicial Appointments 7th Annual Report 2004-2005", http://www.dca.gov.uk//ja-arep2005/partone.htm ; and the Summary of responses to consultation available at: http://www.dca.gov.uk/consult/judiciary/responsecp25-04pdf.

The extent to which judges' attitudes are affected by their backgrounds is somewhat difficult to assess in the absence of empirical evidence. Professor Griffith has argued that: "Judges are the product of a class and have the characteristics of that class",[126] that their views of the public interest and of what is right are inevitably coloured by the "kind of people they are and the position they hold in our society",[127] and that, as part of the established order, they are (albeit generally unconsciously)[128] more concerned with preserving and protecting the status quo than embracing the interests of minority groups.[129] Certainly, as educated professionals, judges are likely to have more in common with and to find it easier to relate to fellow professionals such as doctors, than to incapacitated adults.

Judges themselves, on the other hand, are usually keen to emphasise that, in spite of their privileged position in society, they are able to recognise and put aside the "prejudices of their age and upbringing",[130] and are 'in touch' with reality and community concerns. One of the reasons given by judges for this is the fact that they are professionals, and as professionals are able to recognise that impartiality and independence are part and parcel of the job.[131] Another is that judges are able to recognise and reflect community views because they "live, work and spend their leisure time in the community",[132] as Lord Devlin stated:

> Judges and barristers have unique opportunities of seeing the ordinary man in action, not in a general way, but in connection with such of his affairs

[126] Griffith (n.123), 338. *C.f.* Pannick, *Judges* (1987), 31.
[127] Griffith, *ibid*., 336.
[128] *Ibid.,* 340.
[129] *Ibid*., 342.
[130] P. Devlin, "Judges, Government and Politics" [1978] 41 *M LR* 501, 507, 511. *C.f.* Bingham (n.76), 80.
[131] Thomas (n.22), 365. Bingham (n.76), Part II, Ch.2.
[132] Thomas, *ibid*.

> as the law impinges upon,…They have spent a great part of their working lives listening to him (in a variety of types) in the witness-box; …They would be blockheads if they did not absorb from what is so constantly acted out before them a sense of the ordinary man's attitudes in the situations with which the law has to deal. This sense is what practising lawyers extol as common sense.[133]

Even if one accepts this view, regarding the examples of judges behaving in a biased, stupid or intemperate manner contained within accounts of the British Judiciary[134] as having largely been relegated to the history books by the judicial appointments process,[135] judicial training and guidance,[136] and by an increased unwillingness amongst members of the legal profession and the judiciary to tolerate unacceptable judicial behaviour,[137] further problems remain with common sense decision making.

(ii) Common sense, stereotypes and bias.

One of the main problems with common sense, whether used by lawyers or by laymen, is that it may be tainted by bias or fixed attitudes.[138] I have already referred to the 'stock of knowledge'[139] which we draw upon when making common sense decisions. This may be unsatisfactory in at least two respects. First, it may contain downright prejudiced and bigoted views. For instance, proverbs and other well-known sayings or

[133] P. Devlin (n.55), 22-23; *C.f.* Judge LJ, "Heroes and Villains", (2003), Speech: Society of Editor's Annual Conference, 13th October (http://www.dca.gov.uk).
[134] See *e.g.* Bingham (n.76), 80-81; D. Pannick (n.126), Chs. 2 & 4; MacKinnon, "The Origin of the Commercial Court" [1944] 60 *LQR* 324.
[135] See the Judicial Appointments Commission website at http://www.judicialappointments.gov.uk re: appointment procedures and policies.
[136] See *e.g.* Judicial Studies Board (2010) *Equal Treatment Bench Book*, at http://www.judiciary.gov.uk/publications-and-reports/judicial-college/Pre+2011/equal-treatment-bench-book.
[137] See *e.g.* Bingham (n.76), 80; *R* v. *Lashley* [2005] EWCA Crim 2016, [48]; *R* v. *Dickens* [2005] EWCA Crim 2017, [27].
[138] Maher (n.12), 605.
[139] Above, Ch.1, 71-72.

words in general use may contain racist,[140] chauvinistic,[141] or otherwise discriminatory[142] slurs which help to perpetuate prejudice and stereotypical attitudes towards certain sections of society. Second, even where our stock of knowledge is not overtly prejudiced, it will include familiar and generally accepted cultural conventions,[143] which may well include stereotypical views about how people do or should behave.[144] An illustration of this may be found in the case of *Rochdale Healthcare (NHS) Trust* v. *C,*[145] in which Johnson J., notwithstanding the opinion of a consultant obstetrician that "the mental capacity of the patient was not in question and that she seemed to him to be fully competent",[146] determined that the patient lacked capacity to refuse a caesarean section operation, based apparently upon androcentric, stereotypical views about the capacity of women in labour: "…the patient was not capable of weighing-up the information that she was given…The patient was in the throes of labour with all that is involved in terms of pain and emotional stress".[147]

These generally accepted conventions may include 'master narratives', which have been described by Hilde Lindemann Nelson as:

> …the stories found lying about in our culture that serve as summaries of socially shared understandings….we use them not only to make sense of our

[140] Eg. "Taffy was a Welshman, Taffy was a thief…"; "The only good Indian is a dead Indian". See W. Mieder, ""The Only Good Indian is a Dead Indian" History and Meaning of a Proverbial Stereotype", (1995) 1(1) *De Proverbio*, at http://www.deproverbio.com/DPjournal/DP,1,1,95/INDIAN.html; MacCrimmon, (n.11), 1442-1443.
[141] Eg. "Hell hath no fury like a woman scorned". See: W. Mieder, "A Proverb a Day Keeps No Chauvinism Away", (1999) 5(2) *De Proverbio*, at http://www.deproverbio.com/DPjournal/DP,5,2,99/MIEDER/CHAUVINISM.html; Y.K. Yusuf, "The Sexist Correlation of Women with the Non-Human Human in English and Yoruba Proverbs",
[142] eg. Terms such as "spastic" or "spaz", "numpty" or "loony".
[143] Judicial Studies Board: *Equal Treatment Bench Book*, Ch. 1.1.
[144] *Ibid.*, 1.1.2.
[145] [1997] 1 FCR 274.
[146] *Ibid.*, 275.
[147] *Ibid.*

> experience…but also to justify what we do…As the repository of common norms, master narratives exercise a certain authority over our moral imaginations and play a role in informing our moral intuitions.[148]

For example, rescue narratives, which are very important in myth and literature, may be regarded as master narratives: we were all brought up upon stories of damsels being rescued from dragons or general distress by brave knights; tales of plucky kids or detectives (private or otherwise) rescuing others from peril and vanquishing villains, and stories of war or conflict frequently contain rescue themes.[149] Rescue narratives may also be seen as providing a dominant model in relation to medical practice, particularly in relation to emergency and pediatric medical practice,[150] with disease, illness and death being regarded as evils and the doctor as "the rescuer, a heroic warrior against illness and despair".[151] The successes of modern technological medicine help to foster this rescue narrative, meaning that many patients can either be saved or have their lives prolonged in a way that would have been impossible in earlier times. These 'rescue' narratives are reinforced in the public perception by the media. For example, stories of how patients are treated for cancer are almost invariable spoken of in terms of there being a 'struggle', 'fight', or 'battle' against the disease.[152] The significance of this so far as medical law is concerned, is that an uncritical acceptance of, and reliance upon, such narratives may lead judges to accept a medicalised view of the patient's best interests, since the stereotypical notion of doctors as altruistic rescuers carries with it the assumption that they are doing the best for their patient.

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[148] H. Lindemann Nelson, *Damaged Identities, Narrative Repair* (2001), 6-7; *c.f.* R. Cotterrell, *The Politics of Jurisprudence* (2003), 238-241.
[149] *C.f.* C. Booker, *The Seven Basic Plots: Why We Tell Stories* (2004), Pt.I.
[150] Walter M. Robinson, "The Narrative of Rescue in Pediatric Practice", in R. Charon & M. Montello (eds.) (2002) *Stories Matter: The Role of Narrative in Medical Ethics* (2002), 97, 98.
[151] *Ibid.*
[152] See *e.g.* H. Thompson, "The Last Game" (2006) *Sunday Times*, March 26.

As the Judicial Studies Board has recognised in its guidance to judges, the danger is that the stereotypes or generalisations which may be used by judges when they decide cases will be used to make assumptions about people's behaviour or to supplement gaps in their knowledge:

> Most people 'read' behaviour in terms of their own familiar cultural conventions and in doing so can often misunderstand. Ethnocentrism- the use of one's own taken-for-granted cultural assumptions to (mis)interpret other people's behaviour- is a common human failing. [153]

If these assumptions are incorrect, discrimination may occur, albeit unwittingly and this may lead to injustice. Vulnerable minority groups such as the mentally disabled may fare badly if such a decision making process is used, because, rather than focussing upon individual abilities and needs, they may be 'labelled', for example, as lacking capacity or as learning disabled, and assumptions made as to their behaviour, understanding and abilities.[154] If incorrect assumptions are made, they may have profound consequences for the person concerned, leading to a denial of their human rights. In the case of the mentally disabled this may include the denial of their right to make decisions about their own medical treatment,[155] a denial of the right to reproduce,[156] a denial of their right not

[153] Above (n.143), 1-1. See *e.g.* Ballard, (n.80), 13-14 for an illustration of how English translations of conversations may fail adequately to capture the true nature of what was said and conceal subtle social and cultural conventions contained within the native language (in this case Urdu).
[154] *C.f.* the past use by the courts of the now discredited concept of "mental age" used in cases such as *Re F* [1990] 2 AC 1, *Re GF (Medical Treatment)* [1992] 1 FLR 293 and *Re W (Mental Patient)(Sterilisation)* [1993] 1 FLR 381.
[155] *E.g. Re F*; *Trust A and Trust B* v. *H* [2006] EWHC 1230 (Fam).
[156] *Ibid.*

to be unlawfully detained,[157] and possibly even, in very rare cases, a denial of their right to life.[158]

(iii) Common sense and specialised knowledge.

The third area of difficulty arises in relation to specialised knowledge, which frequently comes before courts in the form of expert evidence. I have previously referred to the technical form of common sense which exists within a discipline such as the law or medicine.[159] Judges rely on their 'legal common sense' and experience when giving judgment.[160] However, in cases which involve other disciplines, such as medical law cases, which concern difficult medical and ethical questions, 'legal common sense' may provide limited assistance. Where judges lack technical expertise they may fall back upon 'ordinary' common sense as a resource,[161] but this may not always be sufficient and, in any event, two potential difficulties may arise in such cases. The first is that judges and lawyers, recognising the expertise of the medical profession in such cases and respecting the authority of medical expert witnesses as fellow professionals, may be unduly deferential to medical opinion. The second, is that problems of communication may arise, which may not be recognised. Terms or concepts may be understood in a different manner in medicine and in law: for example, the law relating to the criminal law defence of insanity does not conform with psychiatric concepts.[162] In any event law and

[157] *R* v. *Bournewood Community and Mental Health NHS Trust, ex parte L* [1999] 1 AC 458.
[158] *Re A* [2000] 4 All ER 961.
[159] Above, 60; Maher (n.12), 599-600.
[160] Maher (n.12), 610.
[161] Above, 61-65.
[162] *M'Naghten's Case* (1843) 10 Cl & Fin 200; A. Norrie (n. 78), 183-185.

psychiatry are likely to approach the same issue from different perspectives and in a different manner, and adapting to the approach of the other discipline may be a difficult exercise, as the forensic psychiatrist Dr. Rob Ferris has observed:

> As separate and unrelated discourses, law and psychiatry make uncomfortable 'bedfellows'. Most decision making within the law is 'black or white', much of medical decision making, particularly psychiatric, is in 'shades of grey'. The psychiatrist giving evidence in a legal forum is forced uncomfortably to relinquish his or her habitual mode of thought ('shades of grey') and eventually to deal in terms of black and white.[163]

MacCrimmon has noted that difficulties relating to communication may be particularly likely to arise in relation to the facts of a case, since determining facts is something that we all do on a day-to-day basis and may therefore be seen as not requiring in-depth analysis.[164] If communication difficulties are to be avoided, those involved in litigation need to exercise caution and to be sensitive to differences or conflict between medical and legal discourses.[165]

Pragmatism: an elitist stance?

I have already touched upon the risk of elitist views intruding into common sense decision making.[166] The pragmatic approach may also descend into an arrogant, more generally elitist approach. As Atiyah has observed, if decisions are based upon the facts

[163] Dr. R. Ferris, "How Psychiatrists Make Diagnoses and Formulate Cases" (2006), Paper, Introduction to Mental Health Review Tribunals Training Course, Legal Action Group, June 22.
[164] MacCrimmon (n.11), 1438.
[165] *Ibid.*
[166] Above, 70-80, 82..

or common sense, rather than upon principle, express theory or rational argument, then the decision maker is acting:

> …rather like the man who says, 'Don't confuse me with the facts, my mind is made up.' He is asking us to trust him, he is seeking to avoid having to explain his reasons, what he is doing and why. To explain, to give reasons, to theorise, is to invite accountability, to expose oneself to criticism and refutation. This elitism has affinities with the reactions of the exasperated parent who is faced with endless questioning from his children who want to know why they must do this, and are not to do that, and who, in the end, cuts short the questioning with the positivist's answer, 'Because I say so'.[167]

Such a paternalistic approach is particularly difficult to justify in the case of judges, who hold positions of authority within a democratic society.[168] Judges give reasons for their decisions so that we may know the process by which they reach their decisions and are able to see if their decision making process is flawed, providing grounds for appeal.[169]

More specifically, in the context of judicial decision making and attempts to justify conduct upon the ground of necessity or best interests, there is a danger that elitist views will predominate in the decision making process. An illustration of this may be found in the infamous case of *Dudley and Stephens,*[170] in which the defendants were convicted of the murder of a cabin boy, Richard Parker. Their yacht having been wrecked in a storm, they were cast adrift in an open boat with no supply of water and little food and, after several days at sea, Dudley, with the agreement of Stephens, killed Parker, who was in a state of prostration, and they had fed upon the body of the boy. The defendants argued that they were not guilty of murder because they had killed "under the pressure of

[167] Atiyah (n.7), 145.
[168] *Ibid.*
[169] *C.f. R* v. *Home Secretary, ex parte Doody* [1994] 1 AC 531, Lord Mustill, 565.
[170] (1884) 14 QBD 273. See below, Ch.5, 193-196.

necessity",[171] but, following a special verdict, it was ruled by a court of the Queen's Bench Division that there was no proof of any such necessity as could justify the killing.[172] In Simpson's study of the case, it is clear that the judge assigned to the case, Baron Huddleston was determined to ensure the conviction of the defendants, although it had been intended throughout by the authorities that the death penalty should be commuted to enable them to be released after a short period of imprisonment.[173] The observation of Lord Coleridge that the defendants' duty, following the shipwreck imposed on them "…the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk"[174] was regarded with cynicism by the *Daily Telegraph*, considering that "It is a trial of the judicial temper if lunch be too late…"[175] As Atiyah has observed, this use of the law to lay down unattainable standards and the inconsistency which may be discerned from the imposition of the death penalty on the one hand and the rapid commutation of the sentence on the other may be regarded as a "pragmatic and elitist compromise which reserves mercy to the authorities, whilst insisting that on the face of things the ordinary processes of the law should be gone through."[176]

[171] *Ibid.*, 277.
[172] *Ibid.*, 287. For a fuller account of the judicial proceedings in this case see: A.W. B. Simpson, *Cannibalism and the Common Law* (1994).
[173] Simpson, *ibid.*, 240-248.
[174] (n.170), 287.
[175] *Ibid.*, 252.
[176] Atiyah (n.7), 147.

Common law, pragmatism and casuistry

Having examined the features of judicial pragmatism, and before I turn to consider judicial decion-making in medical law cases in more depth in the next and subsequent chapters, I wish briefly to consider the analogy which has been drawn between the pragmatic approach of the common law to legal problems and that of casuistry to ethical problems.[177] In considering legal issues in medical cases, one almost inevitably encounters ethical issues: should one conjoined twin be sacrificed to save the life of the other?[178] Should this woman be operated on against her will?[179] Should we subject this incompetent woman to a sterilisation operation to prevent her becoming pregnant?[180] Casuistry, as a method of resolving ethical disputes, fell out of favour in the late 17th century, following its degeneration "into a notoriously sordid form of logic-chopping in the service of personal expediency",[181] and a sustained attack upon the method by Pascal.[182] However, following Jonsen and Toulmin's defence of the 'new' casuistry as a method of resolving contentious moral issues,[183] casuistry has enjoyed something of a revival.

This 'new' casuistry involves case-based reasoning and has been defined by Jonsen and Toulmin as:

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[177] *E.g.* J.D. Arras, "Getting Down to Cases: The Revival of Casuistry in Bioethics" (1991) 16 *Journal of Medicine and Philosophy* 29, 31.
[178] *Re A* (n.83).
[179] *St. George's Healthcare NHS Trust* v. *S* [1999] Fam 26
[180] *Re F* [1990] 2 AC 1.
[181] Arras (n.177), 30.
[182] A.R. Jonsen and S. Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (1988), Ch.12.
[183] *Ibid.*, particularly Pt. IV.

> The interpretation of moral issues, using procedures based on paradigms and analogies, leading to the formulation of expert opinion about the existence and stringency of particular moral obligations, framed in terms of rules or maxims that are general but not universal or invariable, since they hold good with certainty only in the typical conditions of the agent and circumstances of action.[184]

Like the common law approach, casuistry involves 'bottom up' reasoning, beginning with particular cases and then applying abstract or general principles to these cases, rather than beginning with principles: "ethical principles are 'discovered' in the cases themselves, just as common law legal principles are developed in and through judicial decisions on particular legal cases".[185] Indeed casuistry has been described as the "common law ethics model".[186] The development of casuistry as a methodology may also seen as being similar to the pragmatic common law approach: because it is grounded in concrete cases, it develops incrementally and principles 'found' in the cases are "always subject to further revision and articulation in the light of new cases".[187] A further similarity with the pragmatic common law approach may be discerned in the significance that both place upon 'common sense', in the sense of "good, sound, practical sense".[188] The casuistical method relies upon sound, practical or 'commonsensical' intuitions or responses to cases so that the different moral considerations in a particular case can be weighed and a decision made as to how best to resolve any conflict between them.[189]

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[184] *Ibid*., 257.
[185] Arras, (n.177), 33. *C.f.* K.W. Wildes, "The Priesthood of Bioethics and the Return of Casuistry" (1993) 18 *Journal of Medicine and Philosophy* 33, 36; *Re A* (n.83), Robert Walker LJ, 1068:

> The term 'casuistry' has come to have had bad connotations but the truth is that in law as in ethics it is often necessary to consider the facts of the particular case, including relevant intentions, in order to form a sound judgment.

[186] Jonsen and Toulmin, (n.182), 330, *C.f.* 403; Arras (n.177), 33, 36.
[187] Arras (n.177), 35. Above, Ch.1, 22-24
[188] Above (n.9).
[189] Jonsen and Toulmin (n.182), 314; A.R. Jonsen, "Casuistry as Methodology in Clinical Ethics", (1991) 12 *Theoretical Medicine* 295, 306. *C.f.* Wildes (n.185), 38.

The practical, pragmatic approach in casuistical reasoning may mean that this may be seen as a method which can offer useful advice to those in the "medical trenches",[190] but it also means that casuistry is vulnerable to criticisms similar to those made in relation to common law decision-making. In particular, casuistical methodology is reliant upon what are perceived to be 'common sense' views about cases. Such views tend to assume that they have some grounding in majority community views,[191] yet, as Arras has observed,[192] it may be that there is no societal consensus about such views, or they may fail to take into account significant minority views, for example those of ethnic minorities.[193] Further, by focusing upon cases, it may be that larger, fundamental issues, (such as: 'What kind of society do we want?'),[194] are ignored rather than confronted.[195]

However, although casuistical and common law decision-making may be seen to share significant features, including a pragmatic tone, it is possible to overstate casuistry's analogy with the common law, not least because it fails to take account of the fact that common law decision-making takes place within a formal legal system:

> The common law contains a system of *binding* precedent, and identifies individuals (that is, judges) whose interpretation of previous cases is *authoritative.* In the field of bioethics, not only is there no common morality to guide decision-making, but also there are not clearly identifiable moral 'experts' to adjudicate on competing interpretations of previous authority.[196]

[190] Arras (n.177), 38.
[191] Above, 63-65.
[192] (n.177), 48.
[193] Above, 76-80.
[194] Arras (n.177), 48.
[195] *C.f.* above, Ch.1, 40.
[196] E.Jackson, *Medical Law: Text, Cases and Materials*, 2nd edn. (2009),19.

Conclusions

In this Part, I have sought to outline what I would suggest are some of the principle strengths and weaknesses of the pragmatic approach to judicial decision making. The strengths of such an approach are considerable: it may be seen to be practical yet flexible and, by favouring a common sense approach, seeks to remain "grounded" and in touch with public opinion. Its pitfalls are, however, at least as significant: the risk that the approach will descend into a form of judicial 'muddling along', at the expense of legal rationality or the development of coherent legal doctrine; the reliance upon a biased and incomplete narrative and a failure adequately to consider and respect the rights of individuals who are the subject of litigation. I now turn to focus the case law in relation to the development and use of the declaratory jurisdiction and of the justification of necessity in medical law. An examination of judicial decision making in this aspect of medical law discloses, I suggest, that judges are seeking to steer a pragmatic course in their adjudication, and that this approach, although it brings with it the strengths of pragmatism, is flawed with its substantial weaknesses.

Part II

The Development of the Declaratory Jurisdiction in Medical Law

Chapter 3

The Rise of the Declaratory Jurisdiction in Medical Law

Introduction

The declaratory jurisdiction has, over the past twenty five years, been widely used in medical law, to clarify the legal position of medical practitioners before medical treatment is provided,[1] denied, [2] or withdrawn.[3] It plays a crucial role in the development and use of necessity to justify the treatment or care of those who cannot consent for themselves because the use by the courts of the justification of necessity in order to make decisions in respect of incapacitated adults has come about through the exercise by the High Court of the jurisdiction to make declarations,[4] with the courts being asked to grant *ex ante* declarations declaring that a future course of treatment or care will be lawful, rather than sanctioning past conduct.[5] I suggest that in this context, the case of *Re F*[6] marked a shift in the approach of the common law towards necessity, with the courts recognising the relevance of necessity as a justification for the provision of treatment without consent and using the declaratory jurisdiction to sanction treatment before it takes place, rather than dealing with past conduct by a more indirect route, for example,

[1] See *e.g. Re F* [1990] 2 AC 1.
[2] *E.g. Portsmouth NHS Trust* v. *Wyatt* [2005] 1 FLR 21; *Re Wyatt* [2006] EWHC 319.
[3] *E.g. Airedale NHS Trust* v. *Bland* [1993] AC 789.
[4] *Re F* [1990] 2 AC 1, Lord Brandon, 64.
[5] *E.g.* (n.1-3); *Re S* [2001] Fam 15; *Simms* v. *Simms* [2003] EWHC 2734 (Fam), [2003] 1 All ER 669. *C.f. R* v. *Quayle* [2005] EWCA Crim 1415, [2005] 2 Cr App R 34.
[6] [1990] 2 AC 1.

by royal pardon,[7] or by the judge "summing up for an acquittal."[8] In the years between the judgment of the House of Lords in *Re F* and the coming into force of the Mental Capacity Act 2005,[9] the courts made considerable use of the 'common law doctrine of necessity'[10] together with the declaratory jurisdiction. An examination of decided cases in relation to incapacitated adults discloses that the declaratory jurisdiction has evolved "beyond the simple declaration of what will or will not be lawful into something akin to the wardship jurisdiction relating to children",[11] with the courts moving beyond making declarations as to the lawfulness of proposed medical treatment to make declarations with regard to the care and general welfare of incapacitated adults.[12]

Necessity as an *ex post facto* defence has almost invariably been confined to "one-off" emergency situations, with the defence generally operating within a very restricted time-frame.[13] The concern of the courts when considering whether to permit necessity to be used as a defence to conduct which would otherwise be regarded as tortious or criminal, has been to keep the defence within manageable

[7] *R* v. *Dudley & Stephens* (1884) 14 QBD 273.
[8] *C.f. R* v. *Bourne* [1938] 3 All ER 615.
[9] The relevant provisions came into effect on 1st October 2007: The Mental Capacity Act 2005 (Commencement No. 2) Order 2007/1897.
[10] The term used by Lord Goff in *R* v. *Bournewood Mental Health Trust, ex p. L* [1999] 1 AC 458; 485, 488. See Ch 5.
[11] *R (Wilkinson)* v. *Broadmoor Special Hospital Authority* [2002] 1 WLR 419, Hale LJ, [64]. See also: *In re G (Adult Patient: Publicity)* [1995] 2 FLR 528, Stephen Brown P, 530; *In re S (Adult Patient: Sterilisation)* [2001] Fam 15, Thorpe LJ, 29-30; *A* v. *A Health Authority* [2002] Fam 213, Munby J, [38]-[45].
[12] See *e.g. A* v. *A Health Authority*, (n. 11); *In the Matter of MAB* [2006] EWHC 168 (Fam); *In the Matter of MM* [2007] EWHC 2003 (Fam). *C.f.* G. Williams, "The Declaratory Judgment: Old and New Law in "Medical" Cases" (2007) 8 *Medical Law International* 277, 280. Below, Ch.7, 275-279.
[13] See *e.g. R* v. *S and L* [2009] EWCA Crim 85; J. Horder, "On the Irrelevance of Motive in Criminal Law", in J. Horder (ed), *Oxford Essays in Jurisprudence*, 4th Series (2002), 173, 180, 182-183. *C.f.* W. Wilson, *Central Issues in Criminal Theory* (2002), 304. Below, Ch.5.

limits and not to create a defence which may be used to justify conduct which has considerable policy implications,[14] or which could potentially be so wide that it would open a door to anarchy.[15] By contrast, the availability of the declaratory jurisdiction and the willingness of the courts to adapt that jurisdiction in relation to medical law cases have meant that the courts have been able to keep greater control over the use of the defence of necessity in such cases, not only pronouncing upon specific legal issues in relation to the case in hand, but also, where necessary, producing guidance to regulate future conduct.[16]

In Part I, I suggested that the development of common law necessity and of the declaratory jurisdiction in medical law may be seen as being very much in the pragmatic tradition, with the courts focusing upon providing practical remedies.[17] In this Part, I examine the development of the declaratory jurisdiction in medical law before proceeding to consider the origins and development of the justification of necessity in medical law cases in Parts III and IV.

[14] *E.g. Quayle* (n.5). Horder (n.13), 180.
[15] *C.f. Southwark L.B.* v.*Williams* [1971] Ch 734, Lord Denning MR, 733-734; Edmund-Davies LJ, 746.
[16] *E.g. Practice Note: (Official Solicitor: Declaratory Proceedings: Medical and welfare decisions for adults who lack capacity)* (2006) July 28, http://www.officialsolicitor.gov.uk/docs/PracNoteMedicaland WelfareDecisions.doc . The current practice direction, dealing with applications to the Court of Protection relating to serious medical treatment, is Practice Direction E: http://www.publicguardian.gov.uk.
[17] Above, Ch.1, 49-51.

What is the "declaratory jurisdiction?"

Put simply, the declaratory jurisdiction is the jurisdiction which the High Court has to grant declarations or 'declaratory judgments', as they are sometimes called.[18] Zamir and Woolf describe a declaratory judgment as being: "…a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs."[19] In other words, the court, if it grants a declaration, will be pronouncing upon the legal position in a particular case.[20] As Bennion has commented, the accepted position is that:

> The court is given this power to make a declaration solely for the purpose of determining disputes concerning the existence or otherwise of a particular legal right. The essence of the jurisdiction is that the court is like a camera photographing the relevant legal terrain. It registers what exists and declares what it finds. This is in no way a dynamic jurisdiction permitting the court to intervene and take a decision that changes the legal terrain.[21]

A declaration is not an order which can be enforced by the claimant against the defendant, in the way that, for instance, a judgement for damages can. In the context of medical law, the declaratory jurisdiction has been used in order to try and prevent (or at least minimise) the chance of criminal or civil proceedings being instituted against medical practitioners, the courts being asked to declare whether a particular course of care or treatment (or non-treatment) is lawful.

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[18] Rt. Hon. Lord Woolf and J. Woolf, *Zamir & Woolf: The Declaratory Jurisdiction*, 3rd edn (2002) ("Woolf").
[19] *Ibid*., 1.
[20] See *e.g.Nixon* v. *A-G* [1930] Ch 566, Clauson J, 574; *McLaren* v. *Home Office* [1990] ICR 588; *Malone* v. *Metropolitan Police Commissioner* [1979] Ch 344, Megarry VC, 353; Woolf, (n.18), 3.134-3.135.
[21] F.A.R. Bennion, "Consent to surgery on a mentally-handicapped adult" (1989) 133 *Sol. Jo.* 245

The origins of the declaratory jurisdiction

The extensive use of the declaratory jurisdiction to determine issues of medical law and ethics may be a relatively recent development, but the declaratory jurisdiction itself is far from new: courts have been granting declaratory relief for a very long time. Borchard traces the history of the declaratory jurisdiction back as far as pre-classical Roman law,[22] and suggests that the formation of judgments which were essentially "declaratory in form and effect"[23] came about for practical social and economic reasons:

> For centuries the courts of practically all countries have been rendering judgments which are incapable of execution and the execution of which is undesired and unnecessary….With or without express statutory authorization, the necessities of organized communal life have compelled the recognition of the efficacy of the declaratory judgment as a means of terminating legal controversies. All that is new about the declaratory judgment is its name and its broad scope- the phenomenon itself is as old as judicial history.[24]

However, according to Borchard,[25] and Woolf,[26] until the mid nineteenth century, although the Chancery courts were prepared to grant declarations that were ancillary to other relief, they refused to grant "mere declarations of right"[27] as the sole remedy to an action, upon the basis that they lacked the power to do so.[28] A series of Acts in

[22] E. Borchard, *Declaratory Judgments*, 2nd edn. (1941), 87-88.
[23] *Ibid*., 147
[24] Ibid., 137.
[25] *Ibid.*, 128-130.
[26] Woolf (n.18), paras. 2.01-2.04.
[27] *Jackson* v. *Turnley* (1853) 1 Drew 617, 626.
[28] *E.g.*: *Clough* v. *Ratcliffe* (1847) 1 De G & SM. 163 (Ch.D), Knight Bruce VC, 178-179: "Nakedly to declare a right, without doing or directing anything else relating to the right, does not, I conceive, belong to the functions of this court"; *Grove* v. *Bastard* (1848) 2 Ph. 619, Lord Cottenham LC, 621-622: "The Courts in this country have not the power which the courts in Scotland have, of settling such questions by declaration".

the 1850s extended the ability of courts to grant declarations in certain instances,[29] but the door was opened to wider use being made of the declaratory jurisdiction by the reforms made by the Judicature Acts of 1873 and 1875,[30] and with the introduction of the Rules of the Supreme Court 1883, Order 25, rule 5, which stated that: "…the court may make binding declarations of right whether any consequential relief is or could be claimed, or not".[31] Initially, some courts seem to have been rather reluctant to take advantage of this power,[32] but by the early twentieth century courts were starting to use it as the only relief in cases much more frequently and in a wider variety of cases,[33] taking a more liberal approach towards the granting of declaratory relief.[34] The jurisdiction was being extensively used by 1917, prompting Sutherland to comment that: "The practice of making declarations of right has completely revolutionized English remedial law."[35] At this stage, and for most of the twentieth century, an application for a declaration could only be made in private law

[29] The Chancery Act 1850; s.50 Chancery Procedure Act 1852 and the Legitimacy Declaration Act 1858; Woolf (n.18), paras. 2.06-2.08; Borchard (n.22), 215-217. These provisions were, however limited in their application: s.50 applied only to the Chancery courts and was construed by the courts as extending only to cases where consequential relief might be granted (*Rooke* v. *Lord Kensington* (1856) 2 K & J. 753, Page Wood VC, 761), and the 1858 Act only applied to declarations of legitimacy.

[30] The 1873 extended the declaratory jurisdiction to all divisions of the High Court.

[31] Borchard (n.22), 218; Woolf (n.18), para.2.08. This order was subsequently replaced by RSC Ord.15, r.16 of the 1965 rules and the current rule is CPR rule 40.20: "The court may make binding declarations whether or not any other remedy is claimed", (http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part40.htm). According to Woolf the removal of any reference to rights in the current rule "is a recognition by the Civil Procedure Committee that the remedy of a declaration is no longer limited in its application to situations where rights are in issue", (n.18), para. 2.20.

[32] See *e.g. Grand Junction Waterworks Co.* v. *Hampton Urban D.C.* [1898] 2 Ch. 331, Stirling J, 345-6:

> ...when the Court is simply asked to make a declaration of right , without giving any consequential relief, the Court ought to be extremely cautious in making such a declaration, and ought not to do it in the absence of any very special circumstances.

[33] See *e.g. Chapman* v. *Michaelson* [1909] 1 Ch. 238, Farwell LJ, 243; *Dyson* v. *Attorney-General* [1911] 1 K.B. 410, Fletcher Moulton LJ, 421; *Guaranty Trust Co. of New York* v. *Hannay & Co* [1915] 2 K.B. 536.

[34] Woolf, (n.18), paras. 2.15-2.21; *Guaranty* (n.33), Bankes LJ, 572.

[35] E.R. Sutherland, "A Modern Evolution in Remedial Rights -The Declaratory Judgment" [1917-1918] 16 *Mich L Rev* 69, 77.

actions commenced by writ or originating summons.[36] However, with the coming into effect of the new Order 53 of the Rules of the Supreme Court in 1977, an application for a declaration could be made in public law proceedings for judicial review.[37] By the 1980s, when the High Court first began to determine medical law cases in which declaratory relief was sought, the declaration was an established remedy in English Law but, as we shall see, it still had to be expanded and adapted to deal with the difficult legal, moral and social issues which arose in such cases.[38]

The declaratory jurisdiction and medical law cases: introduction

Since the case of *Royal College of Nursing* v. *D.H.S.S.*,[39] the first case in which medical practitioners sought a declaration as to the legality of a proposed future course of conduct, the High Court has, in numerous cases,[40] been "asked to adjudicate on legal points bound up with fundamental and emotive questions of medical ethics"[41] and to grant declarations that action taken by the medical team in a particular case will be lawful. I would suggest that a number of reasons lie behind such actions being brought in order to resolve issues of legal uncertainty in relation to medical treatment or care and that it is necessary first to consider these reasons, in

[36] *O'Reilly* v. *Mackman* [1983] 2 AC 237, Lord Diplock, 283; Woolf (n.18), para. 2.45, 2.47
[37] *Ibid.* See: http://www.hrothgar.co.uk/YAWS/rsc/rsc-53.htm. RSC Ord. 53 has been replaced by Part 54 of the Civil Procedure Rules: http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part54.htm.
[38] *C.f.* Rt. Hon. Lord Woolf, "Are the Courts Excessively Deferential to the Medical Profession?", [2001] 9 *Med. L.R.* 1, 11.
[39] [1981] AC 800
[40] See *e.g. Bland, Re F, Re A (Children)(Conjoined Twins: Surgical Separation)*.
[41] Lord Woolf (n.38), 11.

order to reach a proper understanding of why the declaratory judgment became such a significant feature of medical law.

(a) Medical advances, patient expectation and litigation

First, in the fifty years, advances in medical science have been dramatic, and new life-saving or life-prolonging technologies have significantly improved prospects for the seriously or terminally ill.[42] Medical procedures are carried out today and are regarded as being successful which would not even have been contemplated in previous times because they would have inevitably failed: organ transplants; the intercerebral administration of certain treatments,[43] and the separation of conjoined twins,[44] to give but three examples. Resuscitation techniques, the provision of mechanical ventilation and artificial nutrition and hydration mean that patients can be "rescued" from the brink of death, or kept alive even where the prognosis is bleak and there is no prospect of recovering anything approaching what might be regarded as a 'normal' life.[45] Advances in embryo and stem cell research offer hope to those with conditions such as Parkinson's disease, cystic fibrosis, or damage to the spinal cord; whilst assisted reproductive technologies have helped many suffering from infertility to conceive,[46] and has

[42] *E.g.* cancer treatments, such as Herceptin: *R (on the application of Rogers)* v. *Swindon NHS Primary Care Trust* [2006] EWCA Civ 392.
[43] *E.g. Simms* v. *Simms* [2003] 1 All ER 669.
[44] *Re A* [2000] 4 All ER 961.
[45] *E.g. Bland*; *An NHS Trust* [2006] EWHC 507, and the "Baby Charlotte" litigation: *Portsmouth NHS Trust* v. *Wyatt (no.1)* [2005] 1 FLR 211; *Portsmouth NHS Trust* v.*Wyatt (no.2)* [2005] 2 FLR 480 (HCt), [2005] 1 WLR 3995 (CA); *Re Wyatt* [2006] Fam Law 359.
[46] About 1% of all births are the result of IVF or donor insemination: HFEA (2006) "2006-2007 HFEA Guide to Fertility Problems", Facts and Figures, http://www.hfea.gov.uk.

enabled those at risk of passing on serious genetic diseases to their offspring to select embryos which are not likely to suffer from serious disability.[47]

The rapid pace of medical advances has brought benefits for all of us, but it has also created difficulties for the medical profession and for medical law. Expectations of the ability of modern medicine to cure our ills tend to be high, and blamed, not least by the medical profession themselves,[48] for fostering unrealistic expectations of medicine and medical practitioners,[49] although the influence of the media upon public perception is difficult to assess and would need to be confirmed by empirical study.[50] Patients now are also far more aware of new, alternative, or experimental treatments than in the past: the press are quick to publicise pioneering treatments and new alleged 'wonder drugs',[51] and the widespread availability of the internet means that it is used by patients at all stages of their care, to "find second opinions, seek information about tests and treatments, help interpret consultations,

[47] E.g. Duchenne Muscular Dystrophy. See. HFEA Code of Practice, 8th edn. (2009) http://www.hfea.gov.uk; and the list of conditions which have been licenced for PGD, at: http://www.hfea.gov.uk/cps/hfea/gen/pgd-screening.htm ; E. Jackson, *Medical Law, Text, Cases and Materials,* 2nd edn. (2009), 799-801.

[48] *E.g.* At the 2005 BMA Conference, Dr. Andrew Thompson complained that television dramas fostered unrealistic patient expectations, and proposed a motion calling upon the Government to balance the "sugar-coated" media portrayal of CPR. The motion was passed. *C.f.* V. Parry, "Doctors want to shed their white coats and ER image" (2005) *Times*, July 2; S. Lister, "ER Heroes give false hopes to patients" (2000) *Times,* June 30.

[49] *E.g.* studies of the depiction of CPR in television drama have found rates of recovery from cardiac arrest and CPR to be mugh higher than real recovery rates: S.J. Diem *et al.* "Cardiopulmonary Resuscitation on Television- Miracles and Misrepresentation" (1996) 334 *NEJM* 1578; D. Spurgeon, "TV Dramas May Raise False Hope of Surviving Heart Attack" (2002) 352 *BMJ* 408. *C.f* recent studies of English programmes indicate more realistic recovery rates: P.N. Gordon and S. Williamson, "As Seen on TV: Observational study of cardiopulmonary resuscitation in British television medical dramas" (1998) 317 *BMJ* 780.

[50] There is some evidence that the media can influence public perception: *e.g.* C.A. Marco and G.L. Larkin, "Public Education Regarding Resuscitation: Effects of a Multimedia Intervention" (2003) *Annals of Emergency Medicine* 256.

[51] *E.g.* the publicity attached to Herceptin (N. Hawkes, "Breast Cancer is "cured" by wonderdrug say doctors." (2005) *Times,* October 20).

identify questions for doctors, make anonymous private inquiries, and raise awareness"[52] of their condition.

A link between increased patient knowledge and/or expectation upon rates of medical malpractice litigation cannot be proven in the absence of empirical evidence. It might be said that common sense dictates that patients whose expectations are disappointed are more likely to sue, but, as discussed in the previous chapter, although such a view may seem plausible, common sense is not necessarily an infallible guide to the truth.[53] Whether such a link can be established or not, it is clear that there has been a substantial increase in action in clinical negligence claims over the last twenty five years[54] and in the average award of damages made in the event of an action being successful.[55] In addition, doctors appear to be more likely to be prosecuted for their errors, at least where they cause the death of a patient.[56] Most of these prosecutions involve mistakes or slips by

[52] S. Ziebland et al., "How the internet affects patients' experience of cancer: a qualitative study", (2004) 328 *BMJ* 364, 364. J. Eaton, "Europeans and Americans turn to internet for health information." (2002) 325 *BMJ* 989. *C.f.* J. Kivits, "Informed Patients and the Internet", (2006) 11(2) *Journal of Health Psychology* 269: an exploratory study, which suggests that internet searches by patients may complement medical expertise, rather than having an entirely negative effect. *C.f. R (on the application of Rogers* v. *Swindon NHS Primary Care Trust* [2006] EWCA Civ 392; [2006] 1 WLR 2649, [4]: the claimant's son discovered the existence of Herceptin via the internet.

[53] Above, Ch.2, 79-83.

[54] In the late 1970s, there were around 700 claims per year against doctors, dentists and pharmacists. Claims doubled in the period 1983-1987 from 1,000 to 2,000. (DH, *Making Amends: A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS*, (2003), 58 (http://www.dh.gov.uk/). In the year 2006/2007 5,280 new claims were made under the Clinical Negligence Scheme for Trusts, a reduction from the previous year (5,427), although the compensation and legal costs awarded increased from £384,390,000 to £424,351,000: NHS Litigation Authority, Reports and Accounts 2007, (HC 908), http://www.nhsla.com.

[55] In the mid 1970s the average award was £1,454. By 2002 it had increased to £259,038. DH (n.54), 65.

[56] R. Wheeler, "Medical Manslaughter: why this shift from tort to crime?" (2002) 152 *NLJ* 7028; R.E. Ferner and S.E. McDowell: "Doctors charged with manslaughter in the course of medical practice, 1795-2005: a literature review" (2006) 99 *J R Soc Med* 309; "Criminal proceedings will hamper calls for open culture", (2005) 331 *BMJ* 1272; R.E. Ferner, "Medication errors that have led

doctors,[57] which are unintentional,[58] and "more likely to occur when an individual is tired, distracted, or interrupted".[59] Ferner has suggested that this increase in prosecutions is likely to be because of a greater willingness to report incidents to the police, and for the Crown Prosecution Service ("CPS") to prosecute,[60] whilst Holbrook argues that it reflects changed societal attitudes towards gross negligence and a "social intolerance towards 'accidents' as being events that have an innocent origin".[61]

Whatever the reason for the increased rates of civil and criminal litigation in respect of medical errors, the impact of such increases is a matter of some dispute, although it is likely to be negative. Merry and McCall Smith have argued that a situation in which doctors work under a threat of litigation "creates a climate of fear",[62] in which doctors are placed under undue stress and workers are unlikely to give their best performance.[63] It has been suggested that fear of litigation leads to doctors practising "defensive medicine", with treatment which is seen to be "lawyer proof" or "grievance-resistant"[64] being chosen instead of that which is in the patients' best interests.[65] For example, doctors may be over-cautious in ordering

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to manslaughter charges", (2000) 321 *BMJ* 1212. *C.f.* A. Sanders and D. Griffiths, "The prosecution of health care professions for gross negligence manslaughter: luck or lack of judgment?", in A. Sanders and D. Griffiths (eds.) *Medicine, Crime and Society* (forthcoming: 2011).

[57] Ferner and McDowell (2006), (n.56), 310.

[58] A. Merry and A. McCall Smith, *Errors, Medicine and the Law* (2001) 2.

[59] Ferner and McDowell (n.56), 313-314; Karunaratne and Gibbs, "Prosecution or persecution?" (2002) 324 *BMJ* 553.

[60] Ferner (n.56). The conviction rate remains about 30%: Ferner and McDowell (n.56), 313-314. *C.f.* Sanders and Griffiths (n.56).

[61] J. Holbrook, "The criminalisation of fatal medical mistakes" (2003) 327 *BMJ* 1118.

[62] (n.60), 217.

[63] *Ibid.*

[64] R. Tallis, *Hippocratic Oaths: Medicine and its Discontents* (2004), 253-254.

[65] *Ibid. C.f.* DH (n.54), 27; Jackson (n.47), 162.

diagnostic tests and performing certain procedures, such as caesarean sections, when they are not necessary.[66] Although this claim is plausible, and apparently accepted by the courts,[67] there is hardly any empirical evidence in support of it. Indeed, Hartshorne *et al* argue that it is "based upon little more than submissions from counsel and individual judicial knowledge."[68] Whether doctors are practising "defensive medicine" is, in any event, difficult to assess because:

> …there is little clear understanding within the medical profession of what the term…means. "Defensive" may mean simply treating patients conservatively or even "more carefully", and this begs the question whether that treatment is medically justified in the patient's best interests.[69]

(b) Risk society, risk management and the NHS

Whilst the precise impact of litigation rates upon medical practice is disputed, it is clear that risk and its management play an important role in the modern NHS. This is not necessarily because the world had become a more hazardous place.[70] The concept of the "risk society", developed by Beck,[71] and interpreted by Giddens,[72]

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[66] *Ibid. C.f.* NICE, *Caesarean Section: Clinical Guidance CG132* (2011).
[67] *E.g. Wilsher* v. *Essex AHA* [1987] QB 730, Mustill LJ, 747: "The risks which actions for professional negligence bring to the public as a whole, in the shape of an instinct on the part of a professional man to play for safety, are serious and are now well recognised". *C.f.* P. Whipple and P. Havers, "Breach of Duty", in A. Grubb, J. Laing and J. McHale (eds.) *Principles of Medical Law*, 3rd edn. (2010) Ch.4, 4.49.
[68] J. Hartshorne, N. Smith and R. Everton, ""Caparo Under Fire": a Study into the Effects upon the Fire Service of Liability in Negligence" (2000) 63 *MLR*. 502, 522; Whipple and Havers (n.67).
[69] Whipple and Havers (n.67).
[70] As Giddens notes, there is no direct link between the "Preoccupation with risk in modern social life" and the "actual prevalence of life-thereatening dangers". For example, those of us living in developed society are more likely to live to a ripe old age and much less likely to die in infancy or be felled by a deadly epidemic disease than those in previous times: A. Giddens, *Modernity and Self-Identity* (1991), 115-117.
[71] U. Beck, *Risk Society: Towards a New Modernity* (1992); *c.f.* A. Giddens, *The Consequences of Modernity* (1990).
[72] A. Giddens: "Risk and Responsibility" (1999) 62 *MLR* 1. Giddens suggests that the origins of the risk society may be traced to "two fundamental transformations": the "end of nature", which means that few aspects of the physical world are not touched by human intervention, and the "end of

suggests that we live on a "high technological frontier",[73] in which new technologies have caused us to revise taken-for-granted ways of doing things. According to Giddens, risk society is increasingly preoccupied with the future and with safety in a "world which we are both exploring and seeking to normalise and control".[74] Rather than reducing or terminating risk, technological advances may create what Giddens calls "manufactured risk": "new risk environments for which history provides us with very little previous experience".[75] In the context of medicine, new medical technologies can create new problems:[76] for example, improved body imaging,[77] and surgical techniques have meant that it is now medically possible to separate conjoined twins and to "save" at least one of them. As may be seen from the case of *Re A*,[78] this has raised difficult legal and ethical problems, which would not have arisen when successful separation surgery was not an option.

The management of risk is an important part of governance within the NHS. The NHS Litigation Authority[79] has made it clear that risk management should be

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tradition", which essentially means that we live in a world "where life is no longer lived as fate", 3. *C.f.* R.G. Lee and D. Morgan, "Regulating Risk Society: Stigmata Cases, Scientific Citizenship & Biomedical Diplomacy" (2001) 23 *Sydney L. Rev.* 297, 302-306.

[73] Giddens (n.72), 3.

[74] *Ibid.*

[75] *Ibid*, 4.

[76] Beck (n.71), 206

[77] See J.K. Iglehart, "The New Era of Medical Imaging- Progress and Pitfalls", (2006) 354 *NEJM* 2822, re some of the difficulties caused by improvements in medical imaging. In particular, screening for breast and cervical cancer has led to an increase in litigation: J.R. Benson, *et al*, "Screening and Litigation" (2000) 321 *BMJ* 760; R.M. Wilson, "Screening for breast and cervical cancer as a common cause for litigation" (2000) 320 *BMJ* 1352.

[78] [2000] 4 All ER 961; Above, 29.

[79] "NHSLA". The NHSLA is a Special Health Authority established in 1995 to administer the Clinical Negligence Scheme for Trusts ("CNST"), established to provide the means for NHS Tructs to fund the cost of clinical negligence litigation: NHSLA, *Framework Document*, and *Acute, Community, Mental Health & Learning Disability & Independent Sector Standards* (2011/2012), both at http://www.nhsla.com.

embedded into NHS culture: hospital trusts must have an approved risk management strategy, with clear policies aimed at managing risks and clinical risk being systematically assessed, and with programmes in place to reduce risk.[80] There are very clear financial incentives placed upon hospitals to comply with risk management standards approved by the NHSLA: whilst there are financial incentives for those who comply with standards set,[81] failure to meet such standards may lead to a trust being expelled from the CNST and forced to bear its own litigation costs, an outcome which would be financially calamitous.[82] The aims of such risk management systems are to learn from past errors, adverse events and "near misses",[83] raising standards of care and reducing the number of incidents leading to claims.[84] The focus of the NHSLA is principally upon reducing civil claims in negligence, but the possibility of criminal litigation also needs to be borne in mind. Even though no NHS trust has been prosecuted for manslaughter to date,[85]

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[80] (n.79). The NHSLA produces a number of "risk management" publications, including a quarterly review, regular Risk Management Alerts and a biannual journal for clinicians: http://www.nhsla.com.

[81] *E.g.* Trusts who can demonstrate compliance with CNST "Maternity Clinical Risk Management Standards", can receive a discount on their scheme contributions (http://www.dh.gov.uk).

[82] *E.g.* (n.79); M. Brazier and E. Cave, *Medicine, Patients and the Law*, 5th edn. (2011), 267. The NHS Redress Act 2006 will, when brought into force, provide an alternative to litigation for negligence claims of up to £20,000. Details of the scheme will be contained in secondary legislation, which has not yet been published: http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Actsandbills/index.htm. A Bill to amend the Act is currently before Parliament: NHS Redress (Amendment) Bill, http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0096/2012096.pdf. R. Furniss and S. Ormond-Walshe, "An alternative to the clinical negligence system" (2007) 334 *BMJ* 400; A-M Farrell and S. Devaney, "Making amends or making things worse? Clinical negligence reform and patient redress in England" (2007) 27 *LS* 630.

[83] DH, *Building a Safer NHS for Patients: Implementing "An Organisation with a Memory*, (2001), 4.

[84] NHSLA, http://www.nhsla.com/home.htm.

[85] M. Childs, "Medical Manslaughter and Corporate Liability" (1999) 19 *LS* 316. Childs has suggested that hospitals could face prosecution for the offence of corporate manslaughter , particularly in cases such as *Prentice and Sullman* [1993] 4 All ER 935 (CA), where staffing and supervision are inadequate, systems in relation to the administration of drugs are faulty and too much is demanded of junior doctors, 328. *C.f.* N. Allen, "Medical or Managerial Manslaughter", in C.A. Erin and S. Ost (eds.) *The Criminal System and Health Care* (2007), Ch.4; Brazier and Cave (n.82), 211. Most of the Corporate Manslaughter and Corporate Homicide Act 2007 came into force on the

hospital trusts are subject to health and safety legislation, and have been prosecuted for breaches. [86]

(c) Policing doctor's conduct: third parties and the risk of prosecution.

The matter is further complicated because the fact that patients or their families are happy with a course of medical care or treatment does not necessarily protect a doctor from prosecution, since the matter may be reported to the police by third parties, or the police may become involved via press interest.[87] There is also

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6th April 2008. It abolishes the common law liability of corporations for manslaughter (s.20) and creates a statutory offence of corporate homicide. An organisation is guilty of corporate manslaughter if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased (s.1(1)). For a discussion of the potential effect of the 2007 Act upon medical practice, see: A. Samuels, "The Corporate Manslaughter and Corporate Homicide Act 2007: How Will it Affect the Medical World?" (2007) 75 *Medico-Legal Journal* 72; C.Dyer, "New law puts NHS Trusts at risk of charges of corporate manslaughter when patients die" (2008) 336 *BMJ* 741; M. Eagle, "Corporate Manslaughter and the NHS", Speech given at the Wellcome Collection, September 30, 2008, at: http://www.justice.gov.uk/news/sp300908a.htm . It appeared that the first prosecution for corporate manslaughter against an NHS Trust might be in the offing in February 2008, when an inquest jury found that a Mrs. Cabrera, who had died after giving birth at the Great Western Hospital, Swindon because an epidural drug had been wrongly administered, had been unlawfully killed by gross negligence in relation to the sub-standard storage of drugs in the maternity department (http://www.telegraph.co.uk/news/uknews/1577775/Hospital-could-be-charged-over-fatal-epidural.html (accessed 10.1.2010)) but the Trust was prosecuted for health and safety offences only: http://www.guardian.co.uk/society/2009/nov/18/nhs-cabrera-wrong-drug-childbirth (accessed 10.1.2010).

[86] *e.g.* The Health and Safety at Work Act 1974, s.3. The Southampton NHS Trust was convicted of an offence under this section in 2006: the prosecution arose out of a failure of two senior house officers (Doctors Misra and Srivastava) properly to treat a patient who had had a knee operation. The patient became infected with staphylococcus aureus, but the doctors failed to appreciate that he was seriously ill and appropriate antibiotic treatment was not given, with the result that he died of toxic shock syndrome. The doctors were convicted of gross negligence manslaughter (*R* v. *Misra and Srivastava* [2005] 1 Cr. App. R. 21). The Trust was prosecuted for failing adequately to supervise the two doctors. It pleaded guilty and was fined £100,000. *C.f.* O. Quick, "Prosecuting Medical Mishaps" (2006) 156 *NLJ* 394; C.Dyer, "Hospital trust prosecuted for not supervising junior doctors" (2006) 332 *BMJ* 135.

[87] *E.g.* the case of Dr. Moor, who was acquitted of the murder of an elderly, terminally ill patient by administering a large dose of diamorphine to him: A. Arlidge, "The Trial of Dr. David Moor" [2000] Crim L.R. 31.

the possibility of a private prosecution being brought,[88] since English criminal procedure permits private persons to institute criminal proceedings in relation to most offences, even if they have no personal involvement in the subject-matter of the prosecution.[89] Important legal and ethical issues may be involved in medical practice, particularly in relation to treatment at the beginning and end of life.[90] Pressure groups such as the Pro-Life Alliance or individuals who support such organisations have shown that they are willing to bring or support litigation challenging the legality of action which they see as being contrary to the 'right to life', whether it be against relevant NHS authorities or particular individuals.[91] In *Bland*, Lord Browne-Wilkinson recognised the risk that prosecutions may be set in motion by hospital staff with pro-life views:

> …there are now present amongst the medical and nursing staff of hospitals those who genuinely believe in the sanctity of human life, no matter what the quality of that life, and who report doctors who take such decisions to the authorities with a view to prosecution for a criminal offence…their actions have made it extremely risky for a doctor to take a decision of this king when his action may lie on the borderline of legality…[92]

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[88] *R* v. *Bingley Magistrates' Court, ex parte The Reverend James Morrow* The Times, 28 April 1994; LexisNexis transcript.

[89] *R(on the application of Ewing)* v. Davis [2007] EWHC 1730 (Admin). Certain offences can only be instituted with the consent of the Attorney-General or DPP, *e.g*. offences under the Corporate Manslaughter and Corporate Homicide Act 2007 (s.17). *C.f.* Prosecution of Offences Act 1985, ss.3 and 6 ("POA '85"). This requirement is not particularly onerous, since a CPS Crown Prosecutor may give consent on behalf of the DPP: POA '85, s.1(7); http://www.cps.gov.uk/legal/section1/chapter_i.html .

[90] *E.g*. J. McMahon, *The Ethics of Killing: Killing at the Margins of Life*, (2002).

[91] *E.g*. the Pro-Life Alliance is committed to secure legislation "which confers the full protection of the law on all human life from the one cell embryo stage until natural death", http://www.prolife.org.uk/about/manifesto.htm. The Alliance challenged the legality of CNR (Cell Nucleus Replacement) in *R (On the application of Quintavalle)* v. *Secretary of State for Health* [2003] 2 AC 687, and in the case of *Re A (Children) (Conjoined Twins: Medical Treatment)(No 2)* [2001] 1 FLR 267 (CA), sought to remove the official Solicitor as the guardian of Mary, the weaker twin and replace him with the director of the Alliance.

[92] *Bland*, (n.3), 880.

The prosecutions of Dr. Arthur[93] and Dr. Cox,[94] both of whom were tried for the attempted murder of their patients demonstrate this. In the former case Dr. Arthur was reported by an anonymous informer to LIFE,[95] who in turn reported the matter to the police,[96] whilst in the latter, a member of the nursing staff who disagreed with Dr. Cox's actions informed the Police of what had been done.[97]

Part of the difficulty with modern medical practice is that situations may arise in which the legality of aspects of medical treatment or care may be called into doubt. In such situations, criminal or civil litigation may materialise even without negligence on the part of either hospitals or their staff. I would suggest that four types of scenario are of particular relevance here:

(i) ***Medicine outpacing legislation: the resolution of legal uncertainty***

Medical innovations and advances have frequently left the law struggling to keep up.[98] Even where an aspect of medical practice is regulated by legislation, medical developments may mean that procedures or treatments become available

[93] *R* v. *Arthur* (1981), 12 BMLR 1.
[94] *R* v. *Cox* (1992), 12 BMLR 38.
[95] A pro-life charity, "committed to upholding the uptmost respect for human life from fertilisation (conception)", (http://www.lifecharity.org.uk/).
[96] D. Carmen, *No Ordinary Man: A Life of George Carmen* (2002), 111. Carmen was defence counsel at the trial. Dr. Arthur was in charge of the care of a baby, John Pearson, who was born with Down's syndrome and whose parents did not wish him to survive. He prescribed nursing care only and a sedative, DF118. The baby died three days later. Dr. Arthur was acquitted by a jury of the attempted murder of the baby.
[97] *R* v. *Cox* (n.94). Dr. Cox administered a fatal injection of potassium chloride to an elderly female patient suffering from rheumatoid arthritis and other conditions, who was in extreme pain and distress and had expressed a wish to die. Mrs. Boyes's family approved of the treament given. Dr. Cox was convicted of attempted murder.
[98] Cf. *Bland* (n.3), Lord Browne-Wilkinson, 878; Lord Mustill, 888-889.

which were not within the contemplation of the legislature and questions arise as to whether such procedures or treatments are lawful. An example of this arose in *Royal College of Nursing* [99] v. *D.H.S.S.*,[100] a case involving the interpretation of section 1(1) of the Abortion Act, which provides that: "…a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner…". At the time the Act was passed, the only methods used to produce abortions were surgical methods, which had to be conducted by a doctor or surgeon.[101] However, in about 1972 the "extra-amniotic medical induction"[102] method of inducing abortion was introduced for middle trimester abortions, a method which had not been envisaged when the Act was passed.[103] Given the limited role played by doctors in such abortions, an issue arose as to whether in such cases the pregnancy could be said to be terminated by a "registered medical practitioner". The Department of Health, trying to stave off concern on the part of the RCN,[104] issued a circular which stated that the termination was performed by a "registered medical practitioner" and was lawful:

> …provided it is decided upon by him, initiated by him, and that he remains throughout responsible for its overall conduct and control in the sense that any actions needed to bring it to a conclusion are done by appropriately

[99] "RCN".
[100] [1981] AC 800.
[101] *Ibid.*, 803, 821
[102] *Ibid*, Brightman LJ, 808.
[103] This involved the insertion of a catheter into the space between the wall of the womb and the amniotic sac, with the catheter being attached to a pump or drip apparatus through which an infusion of the drug prostaglandin could be transmitted to separate the amniotic sac from the womb. A cannula was also inserted into one of the patient's veins and connected to an oxytocin drip feed. Over a period of between 18 and 30 hours, the treatment would usually force the patient into premature labour and the pregnancy would be terminated. The initial insertion of the catheter and cannula were performed by a doctor, but the rest of the procedure was done by a nurse, who would act in accordance with a doctor's instructions, with a doctor on call to assist if required to do so: [1981] AC 800, 804, 808, 821 and 831.
[104] Who had issued a memorandum in December 1979, expressing the view that the procedure was unlawful: judgment of Woolf J, LexisNexis transcript, 6.

> skilled staff acting on his specific instructions but not necessarily in his presence.[105]

The RCN disagreed with this guidance and brought proceedings in order to clarify the role which nurses could lawfully play in such abortions, seeking a declaration that the circular was wrong in law.[106] Their concern was that nurses who followed the D.H.S.S. guidance might be committing serious criminal offences.[107] If this concern was well founded, the doctors involved in the procedure might also be criminally liable.[108]

This legal dispute affected public interests as well as the interests of the professionals involved, since, as a result of the stalemate between the parties, nurses were refusing to assist in medical induction terminations.[109] Both Woolf J. at first instance and the majority of the House of Lords subsequently, interpreted the relevant passage of s.1(1) in a broad, and I would suggest, pragmatic manner, taking into account the fact that a determination that all stages of the medical induction method of abortion had to be performed by a doctor would mean that such abortions would become impractical, and that doctors would either have to resort to surgical procedures, which were more hazardous for the patient, or decline to treat

[105] The circular was in letter form, with two annexes, and was sent to regional and area medical officers and regional , area and district nursing officers. [1981] A.C. 800, Lord Denning MR, 805.
[106] Woolf J, (n.104), 4.
[107] *E.g.* Under ss. 58 or 59 of the Offences Against the Person Act 1861. The maximum sentences for these offences are life imprisonment and five years' imprisonment respectively: *Archbold*, 19-149; 19-157.
[108] All members of medical staff engaged in the procedure might be guilty of conspiracy to commit the s.58 and/or the s.59 offences: [1981] AC 800, Lord Roskill, 836-837.
[109] Woolf J (n. 104), 7-8.

patients.[110] This approach focused upon the reality of medical practice in a hospital setting, recognising that much of hospital treatment is a "team effort",[111] with doctors and nurses playing their respective roles in the treatment process, and declaring that nurses who acted as part of the medical team, in accordance with the Department's advice did not perform any unlawful acts, as long as their actions were "initiated and strictly controlled by the registered medical practitioner".[112]

(ii) ***Ethical minefields, medical problems and Parliament's failure to legislate***

Second, cases may arise in which difficult legal, moral and social issues arise, in respect of which Parliament has failed to legislate, perhaps because the moral issues involved are so contentious. Of particular relevance here are cases involving "end of life" issues, such as when it is appropriate to withdraw or withhold treatment from critically ill patients or patients in a persistent vegetative state ("PVS").[113] A well-known example of this is the case of *Airedale NHS Trust* v. *Bland*,[114] which concerned a young man who had been injured at the Hillsborough football ground disaster in 1989 and, as a result, had been in a PVS for over three years. There was no hope of recovery or of any improvement in his condition, and the doctors treating him were of the opinion that it would be appropriate to cease further treatment, including nasogastric feeding, as a result of which he would die

[110] Because the induction procedure is lengthy and doctors do not have time to be present throughout: Woolf J (n. 104), 9; [1981] AC 800, Lord Roskill, 837.
[111] [1981] AC 800, Lord Diplock, 828; *c.f.* Lord Keith, 835; Woolf J (n.104), 9.
[112] Woolf J (n.104), 10.
[113] *Re* PVS, see: *Bland* (n.3), Sir Thomas Bingham MR, 806-807; B. Jennett, *The Vegetative State* (2002), Chs.1-2.
[114] *Bland* (n.3).

within a couple of weeks. This was supported by the patient's parents and family, but the doctors treating Mr. Bland became concerned that it might lead to criminal prosecutions for murder being brought against them,[115] and proceedings were instituted by the NHS Trust for declarations that it would be lawful to discontinue all medical treatment and support, including artificial nutrition and hydration (ANH), and that medical treatment need not be provided, save palliative care to allow the patient to die peacefully.[116] The application was opposed by the Official Solicitor,[117] who argued that, by withdrawing ANH, the doctors would be causing the death of Mr. Bland, either upon the basis that the withdrawal could be regarded as a positive act or upon the basis that they would be in breach of their duty to provide their patient with medical care or treatment,[118] and that, because the withdrawal was intended to bring about his death, the doctors could be said to have committed both the *actus reus* and the *mens rea* of the offence of murder.[119] The judges hearing the case, both at first instance and on appeal, recognised that the case involved difficult legal and ethical issues and that, given the risk of prosecution, doctors ought to be provided with a clear ruling as to the legality of the proposed action, and granted

[115] The doctor, had contacted the Sheffield Coroner to inform him of the proposed course of conduct, who had alerted him to the possibility of criminal proceedings being brought against him. Legal advice was then taken, which in due course led to proceedings being instituted by the Trust: (n.3), Sir Stephen Brown P, 796.
[116] *Bland* , 794-795.
[117] *Ibid.*, 835-840.
[118] Generally, where an offence requires proof that a particular result has been caused, English law does not impose liability for an omission to act unless a person is under a legal duty to act; See: D. Ormerod, *Smith & Hogan Criminal Law*, (2011), 13th edn., 67-75; *Bland* (n.3) Lord Browne-Wilkinson, 881-884. *C.f. R* v. *Stone* [1977] QB 354; *R* v. *Gibbins* (1918) 13 Cr. App. R. 134.
[119] J.C. Smith, "*Airedale NHS Trust* v. *Bland*: Case Comment" [1993] Crim LR 877, 879-880.

declarations to the effect that the discontinuance of medical treatment and medical support measures would be lawful.[120]

(iii) *Incapacitated Adults and "Gaps" in the Law*

The case of *Re F* and the subsequent common law in relation to the treatment of incapacitated adults illustrates the difficulties which may arise where there appear to be "gaps" in the law. The specific issue which needed to be addressed in *Re F* was whether the sterilisation of F, an adult woman who lacked capacity to consent to medical treatment, would be lawful, but the case involved a much wider issue as to the legal basis for the treatment of incapacitated adults in general.[121] The difficulty which needed to be addressed in *Re F* arose because of the existence of the general common law principle of "bodily inviolability…the general principle that everyone's body is inviolable in the absence of consent".[122] There were recognised common law exceptions to this general principle in the case of emergency treatment,[123] and "all physical contact which is generally acceptable in the ordinary conduct of daily life",[124] but it was uncertain whether these exceptions extended to cover sterilisation in particular and more generally, how far (if at all) they extended to cover the medical treatment of incapacitated adults.[125] This

[120] *Bland* (n.3). A full analysis of all of the issues raised in *Bland* is beyond the scope of this work. See *e.g.*: Jackson (n. 47), 938-945; Kennedy & Grubb, *Medical Law*, 3rd edn. (2000), 2134-2147.
[121] [1990] 2 AC 1. Below, Chs. 5 and 7.
[122] [1990] 2 AC 1, 14.
[123] *Ibid.; Marshall* v. *Curry* (1933) 3 D.L.R. 260, 274-275. It has always been accepted that emergency treatment is lawful, but the basis for this was uncertain prior to *Re F*: below, Ch.6.
[124] *Collins* v. *Wilcock* [1984] 1 WLR 1172; *c.f.* [1990] 2 AC 1, 14, 30.
[125] [1990] 2 AC 1, 58. *C.f.* A. Grubb and D. Pearl, "Sterilisation and the Courts" (1987) 46 *C.L.J.* 439, 457-458.

uncertainty was of particular concern because, although there had been an ancient prerogative jurisdiction of the Crown under which it had as *parens patriae* the power and duty to protect the persons and property of adults of unsound mind,[126] this jurisdiction had ceased to exist with the coming into effect of the Mental Health Act 1959,[127] and the revocation of the last warrant, which had assigned the *parens patriae* jurisdiction of the Crown in relation to adults of unsound mind to the Lord Chancellor and the judges of the Chancery Division of the High Court.[128] As Lord Brandon noted in *Re F*, the combined effect of these two events was:

> …to sweep away the previous statutory and prerogative jurisdiction in lunacy, leaving the law relating to persons of unsound mind to be governed solely, so far as statutory enactments are concerned, by the provisions of that Act.[129]

This meant that the *parens patriae* jurisdiction could no longer be relied upon to justify the treatment of incompetent adults.[130] Since the Mental Health Act 1959 and the subsequent 1983 Act did not contain any provisions which related to treatment of patients for conditions other than their mental disorder,[131] and at common law no

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[126] For a description of the prerogative jurisdiction, see: Grubb and Pearl (n. 125), 459-460; B. Hoggett, "The Royal Prerogative in Relation to the Mentally Disordered: Ressurrection, Resuscitation, or Rejection?", in M.D.A. Freeman (ed.) *Medicine, Ethics and the Law* (1988), 85, 89-93; H.S. Theobald, *The Law Relating to Lunacy* (1924), 1-63; *A* v. *A Health Authority* [2002] Fam 213, Munby J, [35]-[36]; G.T. Laurie, "Parens patriae in the medico-legal context: The vagaries of judicial activism" (1999) 3 *Edin LR* 95; J. Seymour, "*Parens Patriae* and Wardship Powers, their Nature and Origin" (1994) 14 *OJLS* 159.

[127] On the 1st November 1960. s. 1 provided that:

> Subject to the transitional provisions contained in this Act, the Lunacy and Mental Treatment Act, 1890 to 1930, and the Mental Deficiency Acts 1913 to 1938, shall cease to have effect, and the following provisions shall have effect in lieu of those enactments with respect to the reception, care and treatment of mentally disordered patients, the management of their property, and other matters related thereto.

[128] [1990] 2 AC 1, Lord Brandon, 57-58.

[129] *Ibid*, 58. *C.f. In Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1, Millet LJ, 21-22.

[130] *Ibid*. *C.f*. Lord Griffiths, 70; Lord Goff , 79; Hoggett (n. 126), 93-95

[131] [1990] 2 AC 1, 55. Section 63 of the Mental Health Act 1983 ("MHA '83") provides some power to impose medical treatment without consent :"for any medical treatment given to him for the disorder from which he is suffering, not being treatment falling within section 57 or 58 above, if the

one could provide proxy consent on behalf of an incompetent adult,[132] there was a real question as to what, if any, common law justification made the treatment of an incompetent adult lawful.[133] Calls were made for the restitution of the prerogative jurisdiction,[134] but it was doubtful as to whether that was either possible, or would provide a suitable solution.[135] The House of Lords in *Re F* resolved this uncertainty, holding that the High Court had inherent jurisdiction to make declarations with regard to the lawfulness of treatment of incapacitated adults.[136]

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treatment is given by or under the direction of the responsible medical officer." However, the scope of this statutory provision is limited in several important respects:

(i) Treatment is limited to patients "liable to be detained" under the MHA '83 (See s.56(1));

(ii) It must be "medical treatment". This includes nursing and "care, habilitation and rehabilitation under medical supervision" (s.145(1)).

According to Hoggett, it may not always be easy to distinguish between treatment which would qualify (e.g. milieu therapy designed to modify behaviour) and that which would not (e.g. a system of detention and discipline imposed for the sake of the smoooth running of the system): B. Hoggett, *Mental Health Law*, 4th edn. (1996), 144). The Mental Health Act 2007 ('MHA '07'), s.7(1) amends this to read: "...psychological intervention and specialist mental health habilitation, rehabilitation and care", and s.7(3) of the Act inserts s.145(4) into the 1983 Act, which provides that any reference in the Act to medical treatment in relation to mental disorder is to be "construed as a reference to medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations". *C.f.* P. Fennell, *Mental Health: The New Law* (2007) paras. 3.63, 10.13.

(iii) It must be given "for the mental disorder from which he is suffering", which means that there is no power to impose treatment for physical disorders unconnected to any mental disease within the Act.

See: *Re C (Refusal of Medical Treatment*)[1994] 1 F.L.R. 31. Hoggett provides a neat example of the section's limitations (144):

> If a schizophrenic refuses to have his appendix out because his thought control forbids this, it is permissible under s.63 to treat the schizophrenia but not the appendix.

[132] [1990] 2 AC 1, Lord Donaldson MR, 13, Lord Bridge, 57.

[133] *Ibid.*, Lord Goff, 71-74.

[134] *T* v. *T* [1988] Fam 53, Wood J, 68. B. Hoggett, *Mental Health Law*, 2nd edn. (1984), 203-204. *C.f.* Hoggett, (n.131), 100, where she suggests that a better solution would be to build upon the Mental Health Act, "and experience of guardianship elsewhere".

[135] Hoggett: (n.131), 97-100; (n.134), 137.

[136] [1990] 2 AC 1, Lord Brandon, 65-66; *A* v. *A Health Authority* [2002] Fam 213, Munby J, 225.

(iv) ***Medical practice overstepping the mark?***

More generally, there have been numerous occasions on which a serious issue has arisen as to whether the current or proposed future conduct of medical practitioners will amount not merely to a civil wrong, but to a criminal offence as well. I have already referred to the concern of the RCN in *DHSS* v. *RCN*[137] that their nurses might incur criminal liability for offences relating to the procuring of miscarriage, and of the doctors in *Bland*[138] that they might be prosecuted for murder. Doctors enjoy a privileged position as far as the criminal law is concerned; much of what they do would incur serious criminal liability if performed by a lay person. Examples of this may be found in relation to the law relating to the provision of abortions,[139] and in relation to the law of assault, where it has been recognised that "proper medical treatment, for which actual or deemed consent is a prerequisite, is in a category of its own":[140]

> How is it that,…a doctor can with immunity perform on a consenting patient an act which would be a very serious crime if done by someone else? The answer must be that bodily invasions in the course of proper medical treatment stand completely outside the criminal law. The reason why the consent of the patient is so important is not that it furnishes a defence in itself, but because it is usually essential to the propriety of medical treatment…if the consent is absent, and is not dispensed with in special circumstances by operation of law, the acts of the doctor lose their immunity.[141]

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[137] [1981] AC 800.
[138] [1993] 1 All ER 789.
[139] Abortion Act 1967, s.1. *C.f.* Tattooing of Minors Act 1969, s.1; Female Genital Mutilation Act 2003, ss.1-3; Human Fertilisation and Embryology Act 1990; Human Tissue Act 2004.
[140] *Brown* [1994] 1 AC 212 (HL), Lord Mustill, 266.
[141] *Bland* [1993] AC 789, Lord Mustill, 891; *C.f. A-G's Reference (No.6 of 1980)* (1981) 73 Cr App R 63 (CA), Lord Lane CJ, 66.

Given this privileged position, it is unsurprising that the courts have, on occasions, had to consider whether the conduct of doctors oversteps the mark. For example, questions have arisen as to whether treatment provided to adults who lack capacity and are unable to consent,[142] or treatment provided in the face of a refusal of consent[143] would amount to a criminal assault.[144] In cases involving "end of life" decisions, such as whether to withdraw life-sustaining treatment,[145] or, as in *Re* A,[146] whether to perform separation surgery upon conjoined twins which would extend the life of one twin, but kill the other, the courts have been asked to consider whether the doctors concerned would be guilty of the crime of murder. The case for providing guidance to medical practitioners in such cases is a strong one, given the serious consequences if the criminal law is transgressed, as was recognised by Lord Goff in *Bland*:[147]

> It would, in my opinion, be a deplorable state of affairs if no authoritative guidance could be given to the medical profession in a case such as the present, so that a doctor would be compelled, either to act contrary to the principles of medical ethics established by his professional body or to risk a prosecution for murder. As Compton J said in *Barber* v. *Superior Court of State of California* (1983) 195 Cal. Rptr. 484, at 486: "a murder prosecution is a poor way to design an ethical and moral code for doctors who are faced with decisions concerning the use of costly and extraordinary 'life support' equipment".

On a practical level, it may be argued that if the legality of an aspect of medical practice is uncertain, doctors may feel inhibited in their work, or may even be

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[142] *Re F* [1990] 2 AC 1;*Re S* [2001] Fam 15..
[143] *E.g. In Re S* [1993] Fam 123; *Re MB (Medical Treatment)* [1997] 2 FLR 426.
[144] And the tort of trespass to the person: see *e.g.* S.D. Pattinson, *Medical Law and Ethics*, 3rd edn. (2011), 115-117; P.D.G. Skegg, *Law, Ethics and Medicine* (1984). Ch. 5.
[145] *Bland*, (n.3); above, 112-114; *c.f.* J. Bridgeman, "Declared Innocent?",(1995) 3 *Med. L. Rev.*117. For a discussion re the criminal law in relation to ending the life of a patient see: J. McHale and M. Fox, *Health Care Law* (2007), 1014-1021.
[146] [2000] 4 All ER 961.
[147] (n.3), 862-863. *C.f.* Lord Browne-Wilkinson, 880-881.

deterred from providing certain forms of treatment or care,[148] and the courts have recognised that, as a matter of public interest, medical practitioners should be able to provide treatment and care to those who need it, unfettered by concerns about the legality of their actions.[149] It may also be argued that there are sound reasons of legal principle[150] why the courts should be able to use the declaratory jurisdiction to provide *ex ante* guidance to doctors who wish to know if a proposed course of conduct is lawful. As Smith has stated:

> The criminal law is the system of rules by which he must live under pain of opprobrium and penalty should he fail to conform to its dictates. It follows as a matter of principle that he should be able to know in advance precisely what it enjoins him to do or abstain from doing. As an American court pithily put it, "the right to test a statute by submitting to arrest is not a remedy." Where a citizen wishes to know the limits of the permissible, some mechanism ought to be available to enable him to ascertain them.[151]

The principle referred to here is known as the 'principle of legality',[152] or as the 'rule of law',[153] and is regarded as a fundamental principle underpinning the criminal law and guiding statutory interpretation.[154] The principle requires that the law be

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[148] See *e.g. RCN* v. *DHSS* (n.137). *C.f. Re F* (n.142), Lord Bridge, 52.
[149] *E.g. Re F*, (n.142), Neill LJ, 30; Lord Bridge, 52; Lord Griffiths, 69; Lord Goff, 77; Lord Jauncey, 83.
[150] A.T.H. Smith, "Clarifying the Criminal Law: Declarations in Criminal Proceedings", in P. Smith (ed.) *Criminal Law: Essays in Honour of J.C. Smith* (1987), 132-147, 138.
[151] *Ibid. C.f.* Bridgeman (n.145), 119.
[152] *Nulla crimen sine lege* ('no crime without a law'). See *e.g.* G. Williams, *Textbook of Criminal Law*, 2nd edn. (1983), 7; W. Wilson, *Criminal Law: Doctrine and Theory*, 4th edn. (2011), 19-20; A. Ashworth, *Principles of Criminal Law*, 6th edn., (2009), 57-74.
[153] *E.g.* A.P. Simester, G.R. Sullivan and G.J. Virgo, *Simester and* Sullivan's Criminal *Law: Theory and Doctrine*, 4th edn., (2010), Ch. 2; Ashworth, *ibid.*, 57. A detailed analysis of the principle and the literature relating to it is beyond the scope of this study, see *e.g.* A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885), 10th edn. (1959); L. Fuller, *The Morality of Law* (1964); J. Rawls, *Theory of Justice* (1973), rev ed. (1999); J. Raz, *The Authority of Law* (1979); J. Jowell, "The Rule of Law and its Underlying Values", in J. Jowell and D. Oliver, *The Changing Constitution*, 6th edn., (2007), 5.
[154] See *e.g. B (A Minor)* v. *DPP* [2000] 2 AC 428, Lord Steyn, 470: "…in the absence of express words or a truly necessary implication, Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text". *C.f. R* v. *Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539, Lord Browne-Wilkinson, 573-575; Lord Steyn, 587-589;

sufficiently certain for an individual to "be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail",[155] and its rationale has been summarised by Gardner as follows:

> …the law must be such that those subject to it can reliably be guided by it, either to avoid violating it or to build the legal consequences of having violated it into their thinking about what future actions may be open to them. People must be able to find out what the law is and to factor it into their practical deliberations. The law must avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and to frustrate their plans.[156]

In the cases which involve issues as to whether medical treatment or care is lawful, it may be argued that the issuing of declaratory relief to clarify the issue both "dissolves the inhibiting effect of uncertainty"[157] and helps the law to comply with the requirements of the principle of legality.[158]

R v. *Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115, Lord Steyn, 130; Lord Hoffman, 131; J. Bell and G. Engle, *Cross: Statutory Interpretation*, 3rd edn. (1995), 166.

[155] *Sunday Times* v. *UK* (1979) 2 EHRR 245, para. 49; *SW and CR* v. *UK* (1996) 21 EHRR 363, para.45. *C.f. Misra and Srivasteva*, (n.86), Judge LJ, at [34]. The requirement is sometimes referred to as the 'principle of maximum certainty': Ashworth (n.152), 63-66. In US law, the principle is recognised in the 'fair warning' or 'void for vagueness' principles: See *e.g. McBoyle* v. *US* (1930) 283 US 25 at 27; *Kolender* v. *Lawson* (1983) 461 US 352 and Anon., "Declaratory Relief in the Criminal Law" (1967) 80 *Harv L Rev* 1490. 1491-1498. Smith has suggested that the absence of a specific fair warning defence and of a 'mistake of law' defence in English law means that the case for the use of the declaratory jurisdiction in domestic law to clarify doubt about whether conduct is criminal is stronger than the equivalent case in respect of US law: (n.150), 139; *c.f.* G. Williams (n.152), 452-453. For a critical discussion *re* the subject of legal vagueness and the rule of law, see: T.A.O. Endicott, "The Impossibility of the Rule of Law" (1999) 19 *O.J.L.S.* 1.

[156] J. Gardner, "Introduction", in H.L.A. Hart, *Punishment and Responsibility*, 2nd edn. (2008), xxxvi. *C.f. Merkur Island Shipping Corporation* v. *Laughton* [1983] 2 AC 570, Sir John Donaldson MR, 594.

[157] Smith (n.150), 139.

[158] *Ibid*., 132: "The process has the least adverse impact from a rule of law perspective; it enables the citizen to ascertain in advance precisely what he may or may not do without subjecting him to the threat of retrospective sanction". This may be contrasted with what has been termed the 'thin-ice principle' (Ashworth, (n.152), 63; Smith, (n.150), 138). See *Knuller* v. *DPP* [1973] AC 435, Lord Morris, 463:

> Nor do I know of any procedure under which someone could be told with precision just how far he may go before he may incur some civil or some criminal liability. Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he will fall in.

Conclusion

In this Chapter, I have sought to place the use of the declaratory jurisdiction post the House of Lords decision in *re F* in context with the more general use of the declaratory judgment in cases involving issues of medical law and ethics. I have suggested that it is apparent that medical law posed particular legal problems for medical practitioners. First, prior to *re F*, there was the specific difficulty in relation to the treatment of incapacitated adults and whether and upon what basis such treatment was lawful. Second, in some areas of practice, statute law has arguably failed to keep up with medical innovation, leading to concerns as to whether the law sanctioned medical practice that had not been considered by the legislature when passing the relevant Act. Third, cases have arisen which have required the determination of difficult and contentious legal, ethical and social issues, upon which Parliament has failed to legislate. Finally, the privileged nature of much medical practice may, on occasions, lead to questions being raised as to whether the conduct of doctors has gone beyond the limits of the law. Given these problems, there are sound practical and legal reasons why the courts should make use of the declaratory jurisdiction to provide *ex ante* guidance to medical practitioners as to the

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I.e. those whose conduct is on the lawful/unlawful borderline must take the risk that their behaviour will transgress the law – the courts will not specify in advance the precise legal limits in relation to their conduct. See also: *DHSS* v. *RCN* (n. 137), Brightman LJ, 810 (CA); *Marshall* v. *English Electric Co Ltd* [1945] 1 All ER 653, Du Parcq LJ, 659. Re criticism of this principle see *e.g.*: Smith (n.150), 138; Ashworth, (n.152), 63. Courts have generally not used the principle as a basis for declining to provide guidance where an issue has arisen as to the lawfulness of medical treatment or care: *e.g.* the HL judgments in *RCN* v. *DHSS* (n.137), *Re F*, (n.142) and the cases considered in Ch.4, below.

lawfulness of their actions. I now turn to consider how the courts have expanded and adapted the declaratory jurisdiction to deal with the specific difficulty in relation to incapacitated adults encountered in *re F*.

Chapter 4

Jurisdiction

Introduction

Having examined the wider context in relation to the use of the declaratory judgment in medical law, I now turn to examine the development and use of the declaratory jurisdiction in relation to cases involving issues relating to incapacitated adults following *re F*. Once applications began to be made to the court asking the court to determine whether proposed medical treatment upon incapacitated adults was lawful, the question arose as to the most appropriate procedure to deal with such applications.[1] Although the House of Lords in *re F* concluded that such cases should proceed by way of an application for a declaration,[2] this use of the declaratory jurisdiction was not without its difficulties. In particular, the Court of Appeal in *re F* considered that the declaratory procedure was not an appropriate procedure in such cases, on the basis that a declaration merely pronounces what the legal position is and does not alter the substantive law. [3] As Lord Donaldson MR stated:

> For my part, I do not think that this is an appropriate procedure. A declaration changes nothing. All that the court is being asked to do is to declare that, had a course of action been taken without resort to the court, it would have been lawful anyway. In the context of the most sensitive and potentially controversial forms of treatment the public interest requires that the courts

[1] *T* v *T* [1988] Fam 52, Wood J, 62, 68.
[2] [1990] 2 AC 1, Lord Bridge, 51; Lord Brandon, 63-65; Lord Griffirhs, 70; Lord Goff, 81-82.
[3] *Ibid.*, 20, 42.

> should give express approval before the treatment is carried out and thereby provide an independent and broad based "third opinion".[4]

When Lord Brandon rejected these criticisms, I suggest that he made the connection between the necessity/best interests justification and the declaratory jusidiction apparent:

> The first objection, that a declaration changes nothing would be valid if the substantive law were that a proposed operation could not lawfully be performed without the prior approval of the court. As I indicated earlier, however, that is not, in my view the substantive law,... The substantive law is that a proposed operation is lawful if it is in the best interests of the patient, and unlawful if it is not. What is required from the court, therefore, is not an order giving approval to the operation, so as to make lawful that which would otherwise be unlawful. What is required from the court is rather an order which establishes by judicial process (the "third opinion" so aptly referred to by Lord Donaldson of Lymington M.R.) whether the proposed operation is in the best interests of the patient and therefore lawful, or not in the patient's best interests and therefore unlawful.[5]

In other words, as Bartlett has observed:

> In a purely legal sense, the Court's decision meant nothing. The proposed surgery in the case of *F* was not made legal by the decision; legality was dependent upon the surgery being in *F*'s best interests.[6]

This appears to accord with the orthodox view of the ambit of the declaratory jurisdiction: that declarations merely state the legal position,[7] and supports the

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[4] [1990] 2 AC 1, 20. The CA took the view that the preferable procedure would be to amend RSC Ord. 80, the rule at that time concerned with persons under a disability, to provide the procedure in such cases: Lord Donaldson MR, 21; Neill LJ, 34; Butler-Sloss LJ, 42. This proposal was rejected by Lord Brandon (at 63) and Lord Goff (81), upon the basis that the Rules of the Supreme Court merely provided for the practice and procedure to be followed by a court exercising an existing jurisdiction and could lawfully not confer jurisdiction upon a court. Given that the Supreme Court Act 1981, s.84(1) provides that rules of court may be made only "for the purpose of regulating and prescribing the practice and procedure to be followed", it is suggested that the approach of the House of Lords is correct. See F. Bennion, "Consent to surgery on a mentally handicapped adult" (1989) 133 *Sol Jo* 245, for discussion re this point.

[5] [1990] 2 AC 1, 63. *C.f.* G. Williams in "The Declaratory Judgement: Old and New Law in 'Medical' Cases" (2007) 8 *Medical Law International* 277, 282.

[6] P. Bartlett, *The Mental Capacity Act 2005*, 2nd edn. (2008), 27.

[7] Above, Ch.3, 96.

suggestion that Lord Brandon and his fellow Law Lords were not, in *re F*, seeking to expand the declaratory judgment to create a "new substantive jurisdiction".[8]

Declaring the law or altering it?

It has been suggested that the effect of the judgment of the House of in Lords *Re F* was that the declaratory jurisdiction:

> ...evolved from being a declaration which simply states whether a future activity is lawful or not, into one which states it is lawful *as long as it is in the incapacitated person's best interests.* As a result of this development, Bartlett[9] quite rightly argues that the declaratory jurisdiction has escaped the confines of its previously "parasitic" existence (because it required a proposed action to be, for example, tortious), and has become itself a "new substantive jurisdiction" without reference to existing law.[10]

However, Bartlett[11] suggests that *re F* did not bring about this expansion of the declaratory jurisdiction, but that it emerged from a series of more recent cases.[12] Bartlett's analysis of the legal outcome of *re* F, which I suggest is the correct one, was that the issue of "whether doctors performing the surgery would be guilty of a crime or liable in tort for battery",[13] was addressed by "expanding the doctrine of necessity",[14] and that the "procedural mechanism used to reach this result was the Court's declaratory jurisdiction".[15] What the House of Lords was trying to do in *re*

[8] Bartlett (n.6), *C.f.* Williams (n.5).
[9] Williams refers to the first edition of the work: P.Bartlett, *The Mental Capacity Act 2005* (2005), 6. This text is repeated in the second edition, at 27.
[10] (n. 5), 282.
[11] (n.6).
[12] *Re F (Adult: Court's Jurisdiction)* [2001] Fam 38; *Re S (Adult Patient)(Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, and *Re R (Adult: Medical Treatment)* [1996] 2 FLR 99. Below, Ch.7, 275-279.
[13] (n.6), 27.
[14] *Ibid.*
[15] *Ibid.*

F was to create a mechanism which could in practical terms, be made to fill the gap left by the ending of the former *parens patriae* jurisdiction: they were not seeking to cut the declaratory jurisdiction free of its 'parasitic' existence. I suggest that this interpretation is made apparent in the speech of Lord Goff:

> The present position is that the lawfulness of medical or surgical treatment cannot, in the case of adults, depend upon the approval of the High Court...(statute apart) only the exercise of the parens patriae jurisdiction can ensure, as a matter of law, that the approval of the court is sought before the proposed treatment is given. If, however, it became the invariable practice of the medical profession not to sterilise an adult woman who is incapacitated from giving her consent unless a declaration that the proposed course of action is lawful is first sought from the court, I can see little, if any, practical difference between seeking the court's approval under the parens patriae jurisdiction and seeking a declaration as to the lawfulness of the operation.[16]

The emphasis here was upon providing a practical remedy, which as I have suggested,[17] is a feature very much linked to the pragmatic tradition.

Following the decision in *re* F however, the approach of the courts appeared to have shifted towards creating a substantive jurisdiction to make orders in respect of incapacitated adults, what Munby J. has described as:

> ...what is, in substance and reality, a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established *parens patriae* or wardship jurisdictions in relation to children. The court exercises a 'protective jurisdiction' in relation to vulnerable adults...[18]

The expansion of the use of the declaratory jurisdiction was undoubtedly of great practical use, enabling the Courts to move beyond granting declarations in relation

[16] [1990] 2 AC 1, 82-83. *C.f.* Lord Brandon, 63-64.
[17] Above, Ch.1.
[18] *A Local Authority* v. *MA, NA and SA* [2005] EWHC 2942 (Fam),

to medical care and treatment and to exercise the jurisdiction in relation to issues relating to where an incapacitated adult lives and with whom, and in what circumstances he or she should have contact,[19] whether he or she should marry,[20] and whether a surrogate decision-maker should be appointed on their behalf.[21] For practical purposes, the declaratory jurisdiction was being used very much as a 'substitute' *parens patriae* jurisdiction in respect of incapacitated adults. However, if one adopted the view of Munby J. that the courts were not merely 'declaring' the law when they made declarations in respect of incapacitated adults, but were exercising a judge-made, substantive, 'protective' jurisdiction, significant doctrinal difficulties arose in relation to the legal basis of the declaratory jurisdiction, which are considered in Chapter 7 below. An instance perhaps of pragmatic judges solving a practical problem at the expense of doctrinal clarity.[22]

Common law necessity and the declaratory jurisdiction

As we shall see in Chapter 5, when the use of necessity as a justification prior to the decision in *re F* is examined, one of the main reasons that courts have kept

[19] See *e.g. Re C (Mental Patient: Contact)* [1993] 1 FLR 940; *Re S (Hospital Patient: Court's Jurisdiction)* [1995] Fam 26; *Re D-R (Adult: Contact)* [1999] 1 FLR 1161; *Re F (Adult: Court's Jurisdiction)* [2001] Fam 38; *A* v. *A Health Authority* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213; *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 592; *Re S (Adult's Lack of Capacity: Carer and Residence)* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235; *Re G (an adult) (mental capacity: court's jurisdiction)* [2004] EWHC 222 (Fam), [2004] All ER(D) 33; *Local Authority X* v. *MM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443.

[20] *Sheffield City Council* v. *E* [2004] EWHC 2808 (Fam), [2005] Fam 326; *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230; *M* v. *B, A and S (By the Official Solicitor)* [2005] EWHC 1681 (Fam),[2006] 1 FLR 117; *A Local Authority* v. *MA, NA ans SA* [2005] EWHC 2942 (Fam); *X City Council* v. *MM, NB and MAB* [2006] EWHC 168 (Fam), [2009] 1 FLR 443.

[21] *Re S (Adult Patient)(Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292.

[22] Above, 36-40.

very tight constraints upon such defences has been the fear that, if unchecked, such defences would undermine existing legal doctrine, creating legal 'anarchy': "necessity would open a door which no man could shut".[23] As I have indicated, one of the features of common law pragmatic judicial decision-making, is the emphasis which it places upon remedies as a practical means of solving legal problems.[24] In the case of common law necessity, I suggest that the reason why the defence was so widely used in medical law cases was because of its link with the declaratory jurisdiction. The use of the declaratory jurisdiction enabled courts to approve *ex ante* the conduct of doctors in cases where the courts felt that court approval ought to be obtained, secure in the knowledge that if they refused to approve a certain course of treatment, their judgment would be followed by the doctors concerned, because they would not want to run the risks of further civil and criminal litigation, which might ensue if they proceeded in the face of such a judgment. On the other hand, the use of common law necessity as the legal justification for the treatment and care of incapacitated adults meant that routine and uncontroversial treatments could lawfully provided without the courts needing to be troubled:

> ...the lawfulness of a doctor operating on, or giving other treatment to, an adult patient disabled from giving consent, will depend not on any approval or sanction of a court, but on the question whether the operation or other treatment is in the best interests of the patient concerned. That is, from a practical point of view, just as well, for, if every operation to be performed, or other treatment to be given, required the approval or sanction of the court, the whole process of medical care for such patients would grind to a halt.[25]

[23] *Southwark LBC* v *Williams* [1971] Ch 734, Lord Denning MR, 734.
[24] Above, 49-51.
[25] *Re F* [1990] 2 AC 1, Lord Brandon, 56.

Whilst at the same time, the availability of the declaratory jurisdiction meant that the courts could keep a check upon the justification to ensure that it did not get out of hand, providing a practical solution to the problem of keeping a check upon necessity. Following *Re F*, a series of practice notes and directions have been issued by the High Court and the Official Solicitor regulating the procedure to be used when making applications in respect of incapacitated adults.[26] In particular, it has been specified that applications ought to be made in cases involving non-therapeutic sterilisation, the discontinuance of artificial nutrition and hydration for patients in a vegetative state, and cases in which there are disputes or difficulties as to either the patient's capacity or the patient's best interests.

'Real issues' and hypothetical points

The flexibile nature of the declaratory remedy also provides courts with a good deal of control over the cases that they hear, the circumstances in which they are prepared to grant relief and the terms of any relief.[27] First, it should be noted that declarations are discretionary remedies: a judge considering an application for a declaration has a discretion, both as to whether to grant a declaration, and as to the terms of any declaration granted. Pragmatic considerations play an important part in

[26] *E.g. Practice Note (Official Solicitor: Sterilisation)* [1989] 2 FLR 447; *Practice Note (Mental Patient: Sterilisation)* [1990] 1 WLR 1248; *Practice Note (Official Solicitor: declaratory proceedings: medical and welfare decisions for adults who lack capacity)* [2001] 2 FCR 569. There does not appear to be any method of enforcing these requirements: Bartlett, (n.6). Practice Direction 9E – *Applications Relating to Serious Medical Treatment* now regulates applications under the MCA 2005: http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/court-of-protection/.

[27] Woolf, *Zamir & Woolf: The Declaratory Jurisdiction*, 3rd edn (2002), 123-124. See *e.g. Dyson* v *A-G* [1911] 1 KB 410, Cozens-Hardy MR, 417; *Hanson* v *Radcliffe U.D.C.* [1922] 2 Ch 490, Lord Sterndale MR, 507.

the exercise of this control. For instance, the courts have traditionally shown themselves to be very reluctant to exercise their discretion to resolve abstract, speculative or hypothetical questions or issues.[28] Lord Diplock stated in *Gouriet* v. *Attorney-General*:[29]

> …the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.

However, in *In Re S (Hospital Patient: Court's Jurisdiction)*,[30] Millett LJ appeared to adopt a less prescriptive approach, suggesting that this passage was not:

> …an exhaustive description of the circumstances in which declaratory relief can be granted today. It is to be regarded rather as a reminder that the jurisdiction is limited to the resolution of justiciable issues, that the only kind of rights with which the court is concerned are legal rights; and that accordingly there must be a real and present dispute between the parties as to the existence of a legal right.[31]

In medical law cases where declarations have been sought, as we have seen,[32] apart from the specific issues upon which the parties are seeking legal clarification, wider and difficult questions of ethics and social policy may be involved, particularly in cases involving decisions relating to reproduction and to the end of life. It may be tempting for courts to attempt to give advice upon these issues and the parties in the case may even seek to expand the scope of the litigation, asking the court to give general guidance. In cases which are already controversial, there is the risk that the

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[28] J. Jaconelli, "Hypothetical Disputes, Moot Points of Law, and Advisory Opinions" [1985] 101 *LQR* 587, 597.
[29] [1978] AC 435, 501. *C.f. Russian Foreign Bank* v *British Bank for Foreign Trade Ltd.* [1921] 2 AC 438, Lord Dunedin, 448; *Malone* v *Metropolitan Police Commissioner* [1979] Ch 490, Sir Robert Megarry VC., 352-352. This view was endorsed in *Oxfordshire County Council* v *Oxford City Council* ("*Oxfordshire C.C. Case")[*2006] UKHL 25, [2006] 2 AC 674, [103], [108] and [131].
[30] [1996] Fam 1 (CA), 21-22.
[31] *Ibid.*
[32] Above, Ch.3, 112-114.

courts will become embroiled in wider issues of moral, social and political concern which are not "appropriately justiciable on the facts of the case".[33] In *Gillick*, Lord Bridge recognised this risk when he warned that:

> …the court should, in my opinion, exercise its jurisdiction with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority or proffering answers to hypothetical questions of law which do not strictly arise for decision.[34]

An example of a trial judge failing to follow this advice may be found in the case of *Burke*,[35] in which a patient suffering from cerebellar ataxia, who would inevitably eventually need to be provided with artificial nutrition and hydration ('ANH'), challenged the General Medical Council's guidance upon the withholding and withdrawing of ANH, and sought clarification as to the circumstances in which ANH might lawfully be withdrawn. Munby J purported to agree with the Lord Bridge's warning, observing that: "…it is not the task of a judge when sitting judicially- even in the Administrative Court- to set out to write a textbook or practice manual or to give advisory opinions". [36] However, the Court of Appeal ruled that, by giving general guidance about the withdrawal of ANH, and ranging widely in his lengthy judgment over "fundamentally important questions of medical law and ethics",[37] Munby J had effectively provided a "text book" account,[38] and may have

[33] *R (Burke)* v. *General Medical Council* [2006] QB 273 (CA), ("*Burke*").
[34] [1986] AC 112, 193-194; adopted by Lord Templeman, 206. Approved in *Burke* (n.33), Lord Phillips MR [21].
[35] [2005] QB 424 (Admin Ct); [2006] QB 273 (CA), Lord Phillips MR, [21].
[36] [2005] QB 424, [33]. General guidance re the withdrawal of ANH was provided at: [217]-[222].
[37] (n.33), Lord Phillips MR, [19].
[38] *Ibid.*, [19]:

"lost the wood for the trees",[39] by allowing the litigation to range inappropriately over issues which were not strictly relevant to the specific issues to be determined upon the facts of the case.[40] The Court of Appeal cautioned against courts trying to deal with issues, particularly ethical issues, "divorced from a factual context that requires their determination",[41] recognising that where such "big" issues are concerned there was a risk that a court might cause practical difficulties for medical practitioners by enunciating "propositions of principle without full appreciation of the implications that these will have in practice, throwing into confusion those who feel obliged to attempt to apply those principles in practice".[42]

The reluctance to deal with purely hypothetical or theoretical issues appears to be grounded in the courts' view of their proper role,[43] and in practical concerns relating to the appropriate use of court time. First, the courts have emphasised that their principal function is to adjudicate upon "real" disputes between the parties to a case, rather than determining hypothetical issues of law, ethics or policy which do not relate to existing facts:[44]

> Unlike academic textbook writers and examiners, the courts do not decide legal questions in a vacuum. They know that, while hard cases may indeed

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> The judge himself observed that it was not the task of a judge when sitting judicially- even in the Administrative Court- to set out to write a text book or practice manual. Yet the judge appears to have done just that.

[39] *Ibid*., [38].
[40] *Ibid*., [16], [82].
[41] *Ibid.*, [21].
[42] *Ibid. E.g.*, the Intensive Care Society informed the Court of Appeal that if Munby J's criteria as to when applications had to be made to the court were to be applied, "approximately ten applications a day would have to be made to the courts", [69].
[43] Above, 132.
[44] *Oxfordshire C.C. Case* [2006] UKHL 25, [2006] 2 AC 674, Baroness Hale [134]; *Ainsbury* v. *Millington* [1987] 1 W.L.R. 379 (HL), Lord Bridge, 381.
C.f. J. Jaconelli, "Hypothetical Disputes, Moot Points of Law, and Advisory Opinions" (1985) 101 *LQR* 587.

> make bad law, the particular facts of the case before them do cast a particularly bright light upon the legal issues and may throw up important questions which no rehearsal of the legal arguments in the abstract can ever do….It is only legislators who make legal rulings in general and without reference to a specific set of facts.[45]

Second, on a practical note, there are more than enough 'real' disputes to occupy the courts, without court time being taken up with hypothetical or theoretical questions.[46]

However, although the courts have indicated on numerous occasions that they will not decide abstract, theoretical or hypothetical issues, there is sufficient flexibility within the system to allow them to grant declarations on such issues if they feel it appropriate to do so in the public interest. The fact that an issue before the court is hypothetical does not mean that the courts lack jurisdiction to deal with the issue, merely that they are likely to refuse to exercise their discretion and to decline to grant declaratory relief.[47] In medical law cases, this allows the courts to consider hypothetical issues if they feel that there is an important question of public interest which needs to be resolved, but equally, it allows them to decline to hear such issues if they feel that the public interest is insufficiently engaged. For example, if one examines *DHSS* v. *RCN,*[48] it is difficult to see precisely what legal rights and obligations existed between the parties, yet the issue of jurisdiction was not raised, since: "It was plainly desirable, in the interests of nurses and of the public generally, that the rights and obligations of nurses performing professional duties in

[45] *Oxfordshire C.C. Case* (n.44), Baroness Hale, [134].
[46] Woolf, *Zamir & Woolf: The Declaratory Jurisdiction*, 3rd edn (2002), para. 4.032.
[47] *Ibid.*
[48] [1981] AC 800.

relation to abortion should be clarified."[49] In *Gillick*,[50] even though there was no suggestion that there was "any present likelihood of any of the daughters seeking contraceptive advice or treatment without the consent of their mother",[51] and the possibility of any of her daughters seeking contraceptives whilst underage was "so remote as to make the issue in the proceedings against the health authority purely academic",[52] the case involved important issues in relation to the rights of parents in relation to the custody and upbringing of their children and the lawfulness of doctors' providing medical treatment to children under 16 without their parents' consent, and none of the judges took the view that they lacked jurisdiction or ought to refuse to exercise their discretion to grant declaratory relief on the basis that that the issue in the case was academic. In *Pretty* v. *DPP*,[53] although Lord Hobhouse recognised that the courts could normally exercise their discretion "to refuse to rule upon hypothetical facts",[54] he appears to have accepted that in spite of this, a court would have power "to grant a declaration as to legality or compatibility"[55] if they felt it appropriate to do so. Similarly, in *Re F*, where the issue was whether the proposed future sterilisation operation would be lawful, notwithstanding the fact that F lacked capacity to consent to it, Lord Goff made it clear that the mere fact that the court was being asked to determine whether future conduct would be lawful did not mean that the case did not involve a "real" issue:

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[49] *In Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1, Bingham MR, 15.
[50] [1986] AC 112. *C.f. R (Axon)* v. *Secretary of State for Health* [2006] EWHC 37 (Admin), [2006] QB 240.
[51] *Gillick* (n.50), Lord Fraser, 164
[52] *Ibid.*, Lord Bridge, 191.
[53] [2002] 1 A.C. 800
[54] *Ibid.*, [116].
[55] *Ibid.*

> Here the declaration sought does indeed raise a real question; it is far from being hypothetical or academic. The plaintiff has a proper interest in the outcome,…The matter has been fully argued in court…I wish to add that no question arises in the present case regarding future rights: the declaration asked relates to the plaintiff's position as matters stand at present.[56]

Nor will the courts require that the real justiciable issue be a specific legal right which is vested in one of the parties. In *In Re S (Hospital Patient: Court's Jurisdiction),*[57] the Court of Appeal held that it was sufficient if "the legal right in question is contested by the parties,…and that each of them would be affected by the determination of the issue".[58] The case concerned an elderly Norwegian citizen who had become incapacitated following a stroke. He had previously formed a relationship with the Plaintiff, who had arranged for his admission to a private hospital for treatment and care. However, his wife and son, who lived in Norway, arranged for his transfer to a nursing home near Oslo. The Plaintiff sought an injunction to prevent this transfer and a declaration as to the appropriate course for S's future care, but her right to do so was challenged by S's wife and son, who argued that the plaintiff's "so-called right"[59] to look after S "was not a legal right at all, but rather a social or moral duty",[60] which belonged to S rather than to the plaintiff. The Court of Appeal refused to take such a narrow approach and ruled that a dispute between rival claimants in relation to the care of an adult incapacitated patient who was incapable of either articulating or exercising his "legal right to

[56] [1990] A.C. 1, 82.
[57] [1996] Fam 1.
[58] *Ibid.*, Millett LJ, 22.
[59] *Ibid.*
[60] *Ibid.*

decide where and with whom he should live"[61] was a justiciable issue, and that the declaratory jurisdiction could properly be invoked.

Further flexibility is built into the exercise of judicial discretion because, although the courts have laid down the general principle that they will not grant declaratory relief in respect of theoretical or hypothetical issues, as Woolf has observed, they have not defined what is a hypothetical issue with any precision, using the terms "abstract", "academic", "theoretical" and "hypothetical" as if they were interchangeable.[62] The courts therefore have considerable leeway in determining what a "theoretical" or "hypothetical" issue is and accordingly, which issues they will, or will not decide.

Pragmatism and Procedure

In Part I, I suggested that one of the principal features of the pragmatic approach to judicial decision-making was the emphasis upon practical problem-solving rather than mere theory. This emphasis upon finding practical solutions to legal problems is reflected in the common law's focus upon remedies, and the courts have been willing to develop or adapt remedies in order to deal with specific difficulties.[63] A similarly pragmatic approach has been adopted in relation to the procedure to be followed when applying for declarations in medical law cases: in cases in which the courts felt that there is a proper issue which ought to be

[61] *Ibid.*
[62] Woolf (n.46), 145-146.
[63] Above, 49-51.

determined, they demonstrated a willingness to be flexible in relation to procedural requirements.

In cases involving issues relating to medical care and treatment where declaratory relief has been sought, it may be seen from the earliest cases that the courts have been unlikely to quibble about the manner in which proceedings have been instituted if they consider that the case under consideration involves an issue which they ought to determine.[64] Lord Bingham MR observed in *Re S (Hospital Patient: Court's Jurisdiction)*, that in none of the reported cases: "has an applicant for declaratory relief failed on purely procedural grounds".[65] Although in the case of *R (on the application of Payne)* v. *Surrey Oakland NHS Trust*,[66] an application for

[64] Following *O'Reilly* v *Mackman* [1983] 2 AC 237, applications for declarations in medical law cases involving issues of public law ought generally to be brought via judicial review proceedings. This rule was not a universal one, and Lord Diplock (at 285) indicated that: "...there may be exceptions, particularly where the invalidity of the decision arises as a colatteral issue...or where none of the parties objects...". This "general rule" has been much discussed in case law and by commentators and it appears that the courts have adopted a much more flexible approach in recent years: see *e.g. Davy v Spelthorne BC* [1984] AC 262; *Wandsworth LBC v Winder* [1985] AC 461; *Gillick* (n.52); *DPP v Hutchinson* [1990] 2 AC 783; *Roy v Kensington and Chelsea Family Practitioner Committee* [1992] 1 AC 624; *R v Secretary of State for Employment, ex. p. Equal Opportunities Commission* [1994] 2 WLR 409; *Mercury Communications* Ltd v *Director General of Telecommunications* 1996] 1 WLR 48; *British Steel Plc v Customs and Excise Commissioners* [1997] 2 All ER 366; *Trustees of the Dennis Rye Pension Fund v Sheffield CC* [1998] 1 WLR 840; *Steed v Home Secretary* [2000] 1 WLR 1169; *Clark v University of Lincolnshire and Humberside* [2000]1 WLR 1988; *R (Wilkinson) v Broadmoor Special Hospital* [2001] EWCA Civ 1545; *A* v. *A Health Authority* [2002] EWHC 18 (Admin/Fam); H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 10th edn. (2009), 566-581; A. Tanney, "Procedural exclusivity in administrative law" [1994] *PL 51*; S. Fredman and G. Morris, "The Costs of Exclusivity: Public and private re-examined" [1994] *PL 69*; C.F. Forsyth, "Beyond O'Reilly v. Mackman: The foundations and nature of procedural exclusivity" (1985) 44 *CLJ* 415; Sir H. Woolf, "Public Law – Private Law: Why the divide – a personal view" [1986] *PL* 220; J. Beatson, "'Public' and 'Private' in English Administrative Law" (1987) 103 *LQR* 34; S. Fredman and G. Morris, "A snake or a ladder? O'Reilly v. Mackman reconsidered", (1992) 108 *LQR 353;* J. Alder, "Hunting the Chimera – The end of O'Reilly v. Mackman", (1993) 13 *LS* 183; R. Bateson, "Procedural Exclusivity: What happened to Clark?" [2004] 9 *Judicial Review* 140. C.f. Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (1994), (Law Com No. 226), Part III "Procedural Exclusivity".

[65] [1996] Fam 1, 18.

[66] [2001] EWHC Admin 461. Collins J. *C.f. R (Collins)* v. *Lincolnshire HA* [2001] EWHC Admin 685.

leave to apply for judicial review in respect of a decision to move an incapacitated adult from a long-term psychiatric hospital which was scheduled to close, was refused, on the basis that the real issue in the case was what was in the best interests of the incapacitated adult, and that was a matter which, if it needed to be litigated, should be dealt with in the Family Division,[67] it is noteworthy that the court decided, in relation to the merits of the case, that none of the grounds raised had "any substance whatsoever".[68] By way of contrast: in the *DHSS* case, although Woolf J. considered that RCN ought to have proceeded by way of judicial review, rather than by originating summons, given the "great urgency for a decision"[69] and the public importance of the case, he was prepared to consider the merits of the case, in spite of the fact that the requirement of obtaining leave to apply for judicial review[70] had been circumvented. In *Gillick*, [71] where proceedings had been issued by writ, it was not suggested that it was improper of Mrs. Gillick to seek declaratory relief in this manner,[72] even though her claim was essentially that the Secretary of State had acted *ultra vires* in issuing a notice in respect of family planning services in which it was stated that family planning clinic sessions should be made available to people irrespective of their age.[73] In *R v. Portsmouth Hospitals NHS Trust, ex parte Glass*,[74] the Court of Appeal made it clear that the courts were willing to adopt a flexible

[67] *Ibid.*, [10]-[12]. Application under the MCA are now be made to the Court of Protection: MCA, ss.16, 17.
[68] *Ibid.*, [9].
[69] [1981] BMLR 40.
[70] RSC Ord.53, now replaced by CPR Part 54.
[71] [1984] QB 581; [1986] AC 112 (HL).
[72] [1984] QB 581, Woolf J, 592; [1986] AC 112, Lord Fraser, 163, Lord Scarman, 177. Counsel for the DHSS mentioned the procedural point before the HL, but did not submit that the procedure adopted was inappropriate: [1986] AC 112, 163.
[73] [1984] QB 581, 592; [1986] AC 112, Lord Frazer, 163; Lord Scarman, 178; Lord Bridge, 192. *C.f.* H.W.R. Wade, "Judicial Review of Ministerial Guidance" (1986) 102 *LQR* 173, 176-177.
[74]("*Glass*") [1999] 2 FLR 905.

approach to procedure where an issue with regard to the best interests of an infant patient needed to be determined. Although comments were made about whether judicial review was the correct procedure in cases involving the welfare of children,[75] Lord Woolf MR stated that:

> ...particularly in regard to cases involving children, the last thing that the court should be concerned about is whether the right procedure has been used in the particular case. The court always has sufficient powers to make sure that if a party adopts the proactive course then the right course can still be pursued and, if necessary, a judge from one Division can sit in the other Division to see that the matter is dealt with.[76]

In *Re F*,[77] Lord Brandon made it clear that "applications for a declaration that a proposed operation on or medical treatment for a patient can lawfully be carried out despite the inability of such patient to consent thereto"[78] should be made by way of originating summons, issuing out of the Family Division of the High Court.[79] It is unsurprising that the House of Lords felt that the Family Division was the most appropriate venue for such cases, since the judges of that Division were experienced in determining "sensitively and humanely"[80] issues relating to the best interests of children, including the issue of whether minors should be sterilised in *In Re D (A*

[75](1999) 50 BMLR 269, Scott Baker J, 273, 277; [1999] 2 FLR 905, Lord Woolf MR, 909-910.
[76] *Glass* [1999] 2 FLR 905, 910. *C.f. Re D (A Minor)* [1987] 1 WLR 1400, Woolf LJ, 1419; *Glass*, (n.220)*; R (Payne)* v *Surrey Oakland NHS Trust* [2001] EWHC Admin 461; *R (P)* v *Secretary of State for the Home Department* [2001] 1 WLR 2002, Lord Phillips MR, 2036-2037; *A* v *A Health Authority* [2002] EWHC 18 (Fam/Admin), Munby J, [72],[89]-[101]. In *A* v *A Health Authority*, Munby J indicated that, in relation to medical treatment, if the case was one where the NHS hospital was willing to treat, but a child patient or her parents were unwilling to consent, then the matter was "one wholly within the realm of private law" which should be resolved in the Family Division by reference to the best interests test (at [92]). If the hospital was not willing to provide the treatment because of lack of resources or reasons of patient priority, then the matter was a public law dispute which "must be resolved, whether in the Family Division or in the Administrative Court, and whether in judicial review proceedings or in some other proceedings, by reference to public law criteria" (at [93]).
[77] [1990] 2 AC 1.
[78] *Ibid.*, 65.
[79] *Ibid.*
[80] *Ibid.*, Lord Goff, 80.

Minor)(Wardship: Sterilisation)[81] and *In Re B*,[82] and had previously determined whether proposed abortion and/or sterilisation operations should be performed on incapacitated adults in *Re T*,[83] *Re X*,[84] and *T* v. *T* .[85] Subsequently, a series of Practice Notes dealing with the sterilisation of incapacitated adults,[86] the withdrawal of artificial nutrition and hydration from patients in a vegetative state,[87] and more generally, with medical and welfare decisions for adults who lack capacity,[88] confirmed that applications for declarations in such cases ought to be made in the Family Division.[89] However, where proceedings have not been issued in the correct Division, this caused little, if any, disruption to the progress of a case, since proceedings were transferred to the relevant Division, if necessary, as a matter of urgency.[90]

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[81] [1976] Fam 185.
[82] [1988] 1 AC 199.
[83] Unreported, 14 May 1987, Latey J. *C.f. Re F* [1990] 2 AC 1.
[84] (1987) *The Times*, 4 June, Reeve J.
[85] [1988] Fam 52.
[86] *Practice Note: (Official Solicitor: Sterilisation)* [1989] 2 FLR 447; *Practice Note: (Official Solicitor: Sterilisation)* [1990] 2 FLR 530; *Practice Note: (Official Solicitor: Sterilisation)* [1996] 3 FCR 95.
[87] *Practice Note: (Official Solicitor: Vegetative State)* [1996] 3 FCR 606.
[88] *Practice Note: (Official Solicitor: declaratory proceedings: medical and welfare decisions for adults who lack capacity)* [2001] 2 FCR 569; *Practice Note: (Official Solicitor: declaratory proceedings: medical and welfare decisions for adults who lack capacity)* [2006] 2 FLR 373.
[89] Hewson argued that applications for "forced" caesareans ought to be issued in the Queen's Bench Division, since that division heard obstetric negligence disputes, but this was not followed in practice: B. Hewson, "How to Escape the Surgeon's Knife", (1997) 147 *NLJ* 752. See: *In re S* [1993] Fam 123; *Norfolk and Norwich (NHS) Trust v W* [1996] 2 FLR 613; *Tameside and Glossop Acute Services Trust v. CH* [1996] 1 FLR 762; *Rochdale Healthcare (NHS) Trust v C* [1997] 1 F.C.R. 274; *Re L (patient: non-consensual treatment)* [1997] FLR 837; *Re MB (Medical Treatment)* [1997] 2 FLR 426; *St. George's Healthcare N.H.S. Trust v S* [1999] Fam 26; *Bolton Hospitals NHS Trust v O* [2003] 1 FLR 824.
[90] *e.g. In Re S* (n.89); Sir S. Brown, "Matters of Life and Death: The Law and Medicine", (1993) 62 *Medico-Legal Journal* 52, 60 and *In Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1. Applications for declarations or orders in relation to incapacitated are now made to the Court of Protection under the MCA: Court of Protection Rules 2007, (SI 2007/1744).

Standing and 'sufficient interest'

The courts have been prepared to adopt a similarly flexible approach in relation to issues relating to standing. In both public[91] and private law proceedings where declarations were being sought as a remedy, the courts were prepared to take a relaxed approach towards standing, provided that the case concerned an issue which they felt ought to be determined. For example, in the *RCN* v. *DHSS* case, there was a question as to whether the applicants were asking the court to declare public rights, because the general rule was that a private individual did not have standing to bring civil proceedings to enforce or to declare public rights, such proceedings had to be brought by the Attorney-General.[92] Woolf J. at first instance was willing to overlook this requirement and accept jurisdiction to decide the case because he recognised that the case was exceptional, because of the relationship between the DHSS and members of the RCN, and because the RCN was responsible for providing both advice and insurance to its members.[93] In *In Re S (Hospital Patient: Court's Jurisdiction)*,[94] when the plaintiff's standing to make the application was challenged, the Court of Appeal held that she was able to demonstrate sufficient standing to bring proceedings, based upon her assumption of the duty of caring for S and the arrangements that she had already made on his

[91] An applicant for judicial review must have a "sufficient interest in the matter to which the application relates": Superior Court Act 1981, s.31(3). This is generally used only to exclude 'busybodies' or those without a legitimate concern in the proceedings: *e.g. R* v. *Somerset CC, ex p. Dixon* [1998] Env LR 111; *Burke* (n.33); *c.f. R (Bulger)* v. *Home Secretary* [2001] EWHC 119 (Admin).
[92] *Gouriet* [1978] AC 435, Lord Wilberforce, 477-478; Viscount Dilhorne, 488-489. Woolf (n.46), para.5.42.
[93] [1981] 1 BMLR 40.
[94] [1996] Fam 1. *C.f. Cambridgeshire County Council v. R* [1995] 1 FLR 50 and *A* v. *A Health Authority* (n.19), Munby J, [42].

behalf. Sir Thomas Bingham M.R.made the court's flexible approach to procedure in general and standing in particular clear, when he summarised the position as follows:

> …the Royal College of Nursing, Mrs. Gillick, doctors, hospital authorities and relatives (whether next friend of the patient or not) have all obtained relief or have been held entitled in principle to do so. It cannot of course be suggested that any stranger or officious busybody, however remotely connected with a patient or with the subject matter of proceedings, can properly seek or obtain declaratory or other relief (in private law any more than in public law proceedings). But it can be suggested that where a serious justiciable issue is brought before the court by a party with a genuine and legitimate interest in obtaining a decision against an adverse party the court will not impose nice tests to determine the precise legal standing of that claimant.[95]

In practice, those responsible for treating and caring for an incapacitated adult will be able to establish sufficient standing to apply for a declaration that a proposed course of treatment is lawful.

Having considered the use of the declaratory jurisdiction in practice, I now turn to consider the effect of a declaration being granted, in particular, whether declarations serve any protective function. One of the criticisms made of the jurisdiction is that, as a matter of law, the fact that a court has granted a declaration that medical treatment is lawful "means nothing",[96] that it may be symbolic of the court's approval, but that effectively it provides medical practitioners in such cases with "little more than a security blanket".[97] The question is whether this opinion adequately reflects law and practice.

[95] [1996] Fam 1, 18.
[96] Bartlett, (n.6), 27.
[97] *Ibid.*

More than a security blanket?

"It is significant that no doctor has actually been prosecuted in a criminal court following the granting of a declaration in a civil court".[98] The orthodox legal position, as stated in *Imperial Tobacco Ltd.* v. *Attorney-General*,[99] was that the issuing of a declaration as to the lawfulness of future conduct would not prevent a subsequent criminal prosecution being brought in respect of such conduct:

> What effect in law upon the criminal proceedings would any pronouncement from the High Court in these circumstances have? The criminal court would not be bound by the decision. In practical terms it would simply have the inevitable effect of prejudicing the criminal trial one way or the other.[100]

Lord Goff in *Bland*[101] recognised that these comments represented an authoritative statement of the law,[102] but suggested that, in practice, "authoritative guidance in circumstances such as these should in normal circumstances inhibit prosecution".[103] Similarly, in *Re F*, Lord Brandon took the "provisional view" that "only the parties to the proceedings and their privies would be bound by, or could rely on, the decision made",[104] although in practice he considered that "that would be enough".[105]

It appears that the granting or refusal of a declaration will determine the issue or dispute which is the subject matter of the application, which is then likely to be

[98] Williams (n.5), 294.
[99] [1981] AC 718
[100] *Ibid.*, Lord Lane,752.
[101] [1993] AC 789, 862. *C.f.* Woolf (n.46), para.4.204.
[102] *Ibid.*
[103] *Ibid.*, 862-863. *C.f.* Lord Denning MR in *RCN* v. *DSS* [1981] AC 800, 805: "If there should ever be a case in the courts, the decision would ultimately be that of a jury".
[104] [1990] 2 AC 1, 64.
[105] *Ibid.*

res judicata between the parties to the action or their privies, who will not be permitted to relitigate the issue or dispute in subsequent civil proceedings.[106] However, in proceedings under the Children Act 1989 involving the welfare of a children, courts have indicated that the strict application of issue estoppel should, where appropriate, give way to the court's duty to have the welfare of the child as its paramount consideration,[107] and I suggest that, if an issue of issue estoppel arose in a case involving the best interests of an incapacitated adult,[108] a similar approach would be adopted. It appears that a declaration made in respect of legal issues relating to medical practice, whether made under common law or the MCA, is very unlikely to amount to a judgment *in rem*,[109] unless the declaration determined the status of a person or a thing, as it might, for example, if it determined the issue of whether a person was legally alive or dead.[110] Some support for this approach may be found in the speech of Lord Brandon in *Re F*, who appears to have regarded the

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[106] Woolf, (n.46), para.1.07.

[107] *K* v. *P (Children Act Proceedings: Estoppel)* [1995] 2 FCR 457, Ward J., 466-467; *Re S (Minors)(Care Orders: Appeal Out of Time)* [1996] 2 FCR 838; *Re L (Minors)(Care Proceedings: Issue Estoppel)* [1996] 1 FCR 221. *C.f. In Re B (Minors)(Care Proceedings: Issue Estoppel)* [1997] Fam 117. K.R. Handley, *Spencer Bower, Turner & Handley, The Doctrine of Res Judicata*, 3rd edn (1996), para.1178.

[108] Mental Capacity Act 2005 ("MCA"), ss.1(5), 4. The courts have accepted on a number of occasions since the coming into force of the MCA that the 'balance sheet approach' adopted in relation to the determination of 'best interests' under the common law (*Re A Medical Treatment: Male Sterilisation)* [2001] 1 FLR 549) has been endorsed by Parliament in the MCA: see e.g. *Re P (Adult Patient: Consent to Medical Treatment)* [2008] EWHC 1403 (Fam); *Re GJ, NJ and BJ (Incapacitated Adults)* [2008] EWHC 1097 (Fam), [2008] 2 FLR 1295; *A Primary Care Trust* v. *A Local Authority* [2008] EWHC 1403 (Fam), [2008] 2 FLR 1196; *In the Matter of P* [2009] EWHC 163 (Ch), Lewison J, [41].

[109] A judgment *in rem* is a judgment made by a court of competent jurisdiction which determines the status of a person or thing and is conclusive against the world: Handley (n.107), 1; Halsbury's Laws of England, vol.12, *Civil Procedure*, 5th edn. (2009), para.1159.

[110] *C.f. Rance v. Mid-Downs HA* [1991] 1 QB 587. In such a case it might be argued that the declaration, affecting the status of someone as a living (or deceased) person was either a judgment *in rem* or should be regarded as equivalent to a judgment *in rem*. *C.f.* the position in relation to matrimonial proceedings: *Bater v. Bater* [1906] P 209; *Callaghan v. Andrew-Hanson* [1992] 1 All ER 56, Sir Stephen Brown P, 63.

declaration in that case as a judgment *in personam*, which could only be relied upon by the parties or their privies. [111]

In criminal cases, the doctrine of *autrefois acquit* prevents a person being tried for a crime of which he has previously been acquitted or convicted,[112] but this would not apply to cases in which a prosecution followed the grant of a civil declaration, because there would not have been a verdict of acquittal by a criminal court.[113] Nor does it appear that issue estoppel could be relied upon in relation to the subject-matter of the declaration: whilst the majority of the House of Lords in *Connelly* v. *DPP* left open the possibility that there might be circumstances in which a defendant might be able to rely upon issue estoppel in criminal proceedings,[114] this suggestion was apparently crushed in *DPP* v. *Humphrys*,[115] where it was clearly stated that the doctrine of issue estoppel had no place in English criminal law. It has been argued by Feldman that the decision in *Humphrys* need not be interpreted as imposing a blanket ban upon the application of issue estoppel in criminal proceedings.[116] However, given the apparent acceptance by the House of Lords that, although their 'authoritative guidance' might "in normal circumstances inhibit prosecution",[117] it would not prevent it;[118] the fact that the principle in *Humphrys*

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[111] [1990] 2 AC 1, 64.
[112] P.J. Richardson (ed.), *Archbold Criminal Pleading, Evidence and Procedure 2011* ("Archbold), paras. 4-117-119; Connelly v. *DPP* [1964] AC 1254 (HL), Lord Morris, 1305-1306. *C.f.* Criminal Procedure and Investigations Act 1996, ss.54-56, and Part 10 of the Criminal Justice Act 2003.
[113] Only an acquittal in prior criminal proceedings before a court of competent jurisdiction will suffice for the plea of *autrefois acquit*: *R* v. *K, B and A* [2007] EWCA Crim 971, [2007] 2 Cr App R 15; *R* v. *L* [2006] EWCA Crim 1902, [2007] 1 Cr App R 1.
[114] [1964] AC 1254. D. Lanham, "Issue Estoppel in the English Criminal Law" [1970] *Crim L R* 428.
[115] [1977] AC 1, Viscount Dilhorne, 21; Lord Hailsham, 40; Lord Salmon, 43; Lord Edmund-Davies, 48; Lord Fraser, 58.
[116] D. Feldman, "Declarations and the Control of Prosecutions" [1981] *Crim LR* 25, 32. *C.f.* J. Bridgeman, "Declared Innocent?" [1995] 3 *Med L Rev* 117,131-132.
[117] *Bland* [1993] AC 789, Lord Goff, 863.

appears to have become well entrenched,[119] and the availability of other methods to halt a prosecution, I suggest that such an argument is very unlikely to succeed.[120]

To date, the Crown Prosecution Service ('CPS') has not sought to institute criminal proceedings in a case where a declaration had been granted stating that a certain course of medical treatment or non-treatment was lawful and it is highly unlikely that they would do so since, for a prosecution to be started by the CPS, Crown Prosecutors would have to be satisfied that there was a realistic prospect of conviction, and that prosecution was required in the public interest.[121] It is difficult to see how a reasonable prosecutor could conclude that either of these tests was satisfied where there had been a High Court declaration that the conduct in question was lawful.[122]

However, it is possible that an individual or interested organisation might seek to bring a private prosecution.[123] If this were to occur, there are a number of methods which might be taken to stop the prosecution. A *nolle prosequi* might be issued to halt the proceedings,[124] or the Attorney-General or Director of Public

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[118] *Ibid. C.f.* Williams (n.5), 292; Bridgeman (n.116), 128.
[119] *E.g.* Archbold, para 4-157.
[120] This approach is supported by the decision in *R* v. *K, B and A* [2007] EWCA Crim 971, [2007] 2 Cr App R 15, Sir Igor Judge P, [60].
[121] *Code for Crown Prosecutors*: http://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html .
[122] Generally, courts will not entertain a challenge by way of judicial review of a decision to prosecute once a prosecution has been started, because the appropriateness of the prosecution can be challenged during the course of the trial or on appeal. *C.f. Archbold*, para.1-264; *R (Securiplan)* v. *Security Industry Authority* [2009] 2 All ER 211.
[123] *R* v. *Bingley Magistrates' Court, ex.p. Morrow* The Times, 28 April 1994; LexisNexis transcript. Below, 148-149.
[124] *Mohit* v. *DPP of Mauritius* [2006] UKPC 20; [2006] 1 WLR 3343. *C.f.* Archbold, 1-251. This ends the prosecution , but does not amount to an acquittal: *Goddard* v *Smith* (1794) 6 Mod 261, Holt

Prosecutions might use their power to take over the prosecution and either discontinue proceedings or offer no evidence against the defendant.[125] A prosecution, once started, might be stayed as being an abuse of the process of the court,[126] or ended following a successful application to dismiss,[127] or submission of no case to answer.[128] None of these methods are entirely ideal, either because they would not nip a prosecution in the bud at a sufficiently early stage, or because although in practical terms they may end criminal proceedings, they do not offer and absolutely cast iron guarantee that future prosecutions might not be brought. This suggests that concerns about whether declarations offer medical practitioners more than a 'safety blanket' are not without foundation. However, in practical terms, these concerns appear to be academic, since in the twenty odd years since *re F* there has been only one attempt to prosecute doctors for conduct following the grant of a declaration, and that case fell at the first fence.

CJ, 262; *R* v *Allen* (1862) 1 B & S 850, Crompton J, 856; *R* v *Frascati* (1981) 73 Cr App R 28. It is not a bar to a future prosecution in respect of the same matter: *R* v *Rowlands* [1851] 17 QB 671; *Poole* v *The Queen* [1961] AC 223; *Richards* v *The Queen* [1993] AC 217.

[125] Prosecution of Offences Act 1985, s.6; Archbold , paras.1-258, 4-189. See: http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#stop . This does not guarantee that a fresh prosecution could not be brought in respect of the same offence: Prosecution of Offences Act 1985, s.23(9), 23A(5). *E.g. R (Charlson)* v. *Guildford Magistrates' Court* [2006] EWHC 3218 (Admin), [2006] 1 WLR 3494.

[126] Feldman (n.116), 32-34; Bridgman (n.116), 132; Williams (n.5), 294. *Connelly* v. *DPP* [1964] AC 1254, Lord Morris, 1301-1302; *C.f.* Lord Devlin, 1347; Lord Pearce, 1361; *DPP* v. *Humphrys* [1977] AC1, Lord Salmon, 46; Lord Edmund-Davies,55. Archbold, 4-54-4-73; C. Wells, *Abuse of Process: A Practical Approach* (2006).

[127] Crime and Disorder Act 1998, Sched.3, para.2, Criminal Procedure Rules, Pt.13. Archbold, 1-28, 1-38-1-40; *R* v. *Thompson and Hanson* [2006] EWCA Crim 2849, [2007] 1 Cr App R 15, Rix LJ, [6]; *R* v. *X* [1989] *Crim LR* 726.

[128] *R Galbraith* (1981) 73 Cr App R 124. See: A.T.H. Smith, "Clarifying the criminal law: declarations in criminal proceedings", in P. Smith (ed.) *Criminal Law: Essays in Honour of J.C. Smith* (1987), 132, 127; Archbold, para.7-79; Feldman (n.116), 35.

In the case of *R* v. *Bingley Magistrates' Court, ex parte the Reverend James Morrow,*[129] the Reverend Morrow sought to prosecute the doctor responsible for the treatment of Anthony Bland with murder.[130] The magistrates' refused to issue a summons and the Reverend Morrow applied for judicial review of this decision. The Divisional Court refused his application. Staughton LJ concluded that the magistrates had been right to refuse to issue a summons, considering that it was "unnecessary" to decide whether the decision in Bland provided "a complete answer to the prosecution", although he indicated that he "thought that it would".[131] Following *R* v. *Metropolitan Magistrate, ex parte Klahn,*[132] it is clear that the magistrates would have been entitled to refuse to issue a summons if they had concluded, after hearing the complaint, either that the offence of murder was not, *prima facie*, made out, or that the prosecution was vexatious and an abuse of process.[133] However, the decision of the magistrates may also be regarded as the "most commonsense way to deal with attempts to bring private prosecutions".[134] Whatever the strict legal position, this case appears to indicate that 'commonsense' judges will not permit such prosecutions to proceed. [135]

Conclusion

In this Chapter, I have examined the development and use of the declaratory jurisdiction, considering the flexible manner in which the courts in 'medical law'

[129] *Morrow* (n.123), 2-3.
[130] *Bland* [1993] AC 789.
[131] Morrow (n.123), 3.
[132] [1979] 1 WLR 933.
[133] *Ibid.*, 935-936; *R (Charlson)* v. *Guildford Magistrates' Court* [2006] 1 WLR 3494, Silber J, [13].
[134] Above, (n.236), 89.
[135] *C.f.* Williams (n.6) 294.

cases have used and adapted the remedy. The focus upon, and use of remedies to achieve the right outcome in a particular case is an important feature of the pragmatic common law approach. The availability of the declaratory jurisdiction meant that courts were able to consider *ex ante* whether more controversial treatments were justified by necessity, and to control the ambit of the justification, both legally, through judgments and practically, by issuing of Practice Directions to regulate how and when applications were made. On the other hand, because the declaratory justification merely 'declared' what the law was, incapacitated adults could be provided with routine medical care and treatment without the courts needing to be troubled because the House of Lords in *Re F* had stated that this was justified by the 'principle' of necessity. A similar pragmatic approach extended to the practical operation of the jurisdiction in relation to medical cases, enabling the courts to determine and provide remedies in cases involving issues which they felt ought to be decided, and yet to decline to provide declaratory relief in cases where they felt that such relief would be inappropriate. Where issues relating to the health or welfare of incapacitated adults needed to be determined, judges were prepared to approach procedure and principle in a highly flexible manner, so that they could 'get on with the action'. Similarly, although the criticism that declaratory jurisdiction is little more than a 'security blanket' for medical practitioners may be correct as a matter of strict law, experience has shown that, in practice, declarations do protect doctors from criminal liability.

PART III

Necessity and Lord Goff's Invention

Chapter 5

Necessity: Principle or Pragmatism?

Introduction: the decision in *Re F*

I have outlined above in Chapter 3, how the coming into force of the Mental Health Act 1959 and the ending of the *parens patriae* jurisdiction over incompetent adults meant that there was a 'gap' in the law in relation to the issue as to whether and upon what basis the treatment of incapacitated adults was lawful.[1] *Re F*[2] was the not the first time that this 'gap' had been considered by the courts,[3] but it was the first case in which it was considered by appellate courts.[4] The case concerned a 36 year-old woman who had been mentally disordered since infancy,[5] and who was residing as a voluntary in-patient in a mental hospital. She had formed a sexual relationship with a fellow patient, and staff at the hospital were concerned that she

[1] Above, Ch.3, 114-116; *T* v. *T* [1988] Fam 52.
[2] *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.
[3] The problem was recognised by Wood J in *T* v. *T* [1988] Fam 52, a case in which a declaration was sought that the termination of pregnancy and sterilisation of an incapacitated 19 year-old woman would not amount to an unlawful act by reason only of her inability to provide a valid consent. The declaration was made on the basis that the treatment was in the woman's best interests and that, in the circumstances, her medical advisers were "justified in taking such steps as good medical practice 'demands'" (68). Declarations that terminations of pregnancy upon incapacitated adult women would be lawful were also sought and granted in *In re T* (1987), (unreported) 14 May, Latey J, and *In re X* (1987) *The Times*, June 4, Reeve J. *C.f. Re F* [1990] 2 AC 1, Lord Donaldson MR, 20.
[4] The issues in relation to the sterilisation of minors had been considered by the House of Lords in *In re B (A Minor)(Wardship: Sterilisation)* [1988] 1 AC 199. See also: *In re D (A Minor) (Wardship: Sterilisation)* [1976] Fam 185; *Re M (A Minor)(Wardship: Sterilisation)* [1988] 2 FLR 497, Bush J.
[5] Probably resulting from a severe upper respiratory tract infection at the age of 9 months: See [1990] 2 AC 1, Lord Donaldson MR, 8-11, where the facts found by the first instance judge, Scott Baker J are cited.

might become pregnant, since ordinary contraceptive methods[6] were considered to be inadvisable or unsatisfactory for her. If she did become pregnant, it was felt that abortion was not a satisfactory option, not least because she might become pregnant again after the termination of pregnancy, and medical opinion considered that the psychiatric consequences to her of having a child would be "catastrophic",[7] since she would be unable to cope with the effects of pregnancy and childbirth.[8] Staff involved with F's care thought it to be against F's interests to take active steps to prevent her participating in any further sexual activity, since that could only be done by severely curtailing her already limited freedom.[9] It was therefore considered by those responsible for her care that it would be in F's best interests to be sterilised, and this view was supported by her mother. However, as F was considered to lack capacity to consent to this or any other form of medical treatment, an originating summons was issued by F's mother, seeking a declaration that such an operation would not amount to an unlawful act by reason only of the absence of F's consent.[10]

The House of Lords unanimously agreed that the proposed sterilisation operation would be lawful in the public interest, with the majority of their Lordships concluding that the operation would be justified because of the principle of necessity. Lord Brandon 'broadly agreed' with the Court of Appeal's view that the treatment of incapacitated adults was lawful because it was in the public interest,

[6] In this case the contraceptive pill and the insertion of an intra-uterine device: [1990] 2 AC 1, Lord Brandon, 53-54.
[7] [1990] 2 AC 1, 10.
[8] *Ibid.*
[9] *Ibid.*
[10] [1990] 2 AC 1, 8

however, he was of the opinion that it was the principle of necessity which "in accordance with which the public interest leads to this result":[11]

> ...the principle is that, when persons lack the capacity, for whatever reason, to take decisions about the performance of operations on them, or the giving of other medical treatment to them, it is necessary that some other person or persons, with the appropriate qualifications, should take such decisions for them. Otherwise they would be deprived of medical care which they need and to which they are entitled.[12]

Lord Goff, whose speech contained the most discursive and the only detailed exposition of the origins of and doctrine relating to the principle of necessity,[13] clearly regarded necessity as providing the justification for treatment: [14]

> Upon what principle can medical treatment be justified when given without consent? We are searching for a principle upon which, in limited circumstances, recognition may be given to a need, in the interests of the patient, that treatment should be given to him in circumstances where he is (temporarily or permanently) disabled from consenting to it. It is this criterion of a need which points to the principle of necessity as providing justification.

Whilst Lord Jauncey expressed entire agreement with the conclusions of Lords Brandon and Goff,[15] and Lord Bridge agreed that it was "axiomatic that treatment which is necessary to preserve the life, health or well being of the patient may lawfully be given without consent."[16] Lord Griffiths on the other hand, expressed agreement with much contained within the speeches of Lords Brandon

[11] *Ibid*., 55.
[12] *Ibid.*
[13] *Ibid*., 73-78. Discussed further below, 243-245.
[14] *Ibid*., 73-74.
[15] *Ibid.*, 83.
[16] *Ibid*., 52.

and Goff, but ultimately took the view that public interest was the key factor which rendered the treatment lawful:[17]

> I agree that those charged with the care of the mentally incompetent are protected from any criminal or tortious action based on lack of consent. Whether one arrives at this conclusion by applying a principle of "necessity" as do Lord Goff of Chieveley and Lord Brandon of Oakbrook or by saying that it is in the public interest as did Neill L.J. in the Court of Appeal, appear to me to be inextricably interrelated conceptual justifications for the humane development of the common law. Why is it necessary that the mentally incompetent should be given treatment to which they lack capacity to consent? The answer must surely be because it is in the public interest that it should be so.

Lord Goff, in his discussion of the doctrinal origins of the principle of necessity applied in *Re* F, made it clear that he regarded the principle of necessity, as being a principle which permeated the common law: "That there exists in the common law a principle of necessity which may justify action which would otherwise be unlawful is not in doubt".[18] In support of this assertion, he drew upon a number of examples of the application of the principle in earlier cases, identifying three groups of cases in which he regarded the principle of necessity as having been historically applied. The first was what he termed cases of "public necessity":

> ...when a man interfered with another man's property in the public interest- for example (in the days before we could dial 999 for the fire brigade) the destruction of another man's house to prevent the spread of a catastrophic fire, as indeed occurred in the Great Fire of London in 1666.[19]

The second group were called cases of " private necessity":

> ...when a man interfered with another's property to save his own person or property from imminent danger- for example, when he entered upon his

[17] *Ibid.*, 69.
[18] *Ibid.*, 74
[19] *Ibid.*

> neighbour's land without his consent, in order to prevent the spread of fire onto his own land.[20]

Whilst the third, which Lord Goff regarded as " more pertinent to the resolution of the problem in the present case",[21] consisted of cases "concerned with action taken as a matter of necessity to assist another person without his consent":[22]

> These cases are concerned with action taken as a matter of necessity to assist another without his consent. To give a simple example, a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong. But there are many emanations of this principle, to be found scattered through the books. These are concerned not only with the preservation of the life or health of the assisted person, but also with the preservation of his property (sometimes an animal, sometimes an ordinary chattel) and even to certain conduct on his behalf in the administration of his affairs.[23]

However, as we will see in this chapter, an analysis of these three groups of cases reveals that the decided cases do not always fit neatly within the three categories suggested by Lord Goff, that the paradigm case for the application of necessity as a justification in both civil and criminal contexts is a one-off emergency,[24] and the courts have been extremely reluctant to permit defences of necessity to succeed in less urgent situations.[25] Although some cases involving the treatment of incapacitated adults might properly be regarded as emergencies,[26] many, including the case of *Re F,* cannot, because they are "cases where the state of affairs is (more or less) permanent".[27] I suggest that if one were to rely merely upon

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[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] See *e.g. Mouse's Case* (1608) Co. Rep. 240.
[25] See *e.g. Southwark LBC* v *Williams* [1971] Ch 734.
[26] See *e.g. Re S (Adult: Refusal of Treatment)* [1993] Fam 123
[27] *Re F* [1990] 2 AC 1, Lord Goff, 76.

the law to be found in the three groups of cases referred to by Lord Goff, one would find scant authority to support the general use of necessity to justify action outside an emergency setting that the House of Lords acheived in *Re F*.

Lord Goff dealt with this difficulty by broadening his consideration of what he saw as being "the historical origins of the principle of necessity"[28] so as to demonstrate that these origins did "not point to emergency as such as providing the criterion of lawful intervention without consent",[29] drawing upon the Roman doctrine of *negotiorum gestio*,[30] upon ancient common law cases "concerned with action taken by the master of a ship in distant parts in the interests of the shipowner",[31] and upon "the cases on agency of necessity in mercantile law".[32]

In this chapter, I review the relevant civil and criminal case-law prior to *Re F* in which necessity has been used by way of defence, and suggest that an analysis of these cases reveals three things. First, it is clear that any doctrine of necessity applied by the House of Lords in *Re F* was considerably wider than that applied in previous cases.[33] Second, notwithstanding Lord Goff's expressed view that a 'principle of necessity' runs through the common law, a view which he has since

[28] [1990] 2 AC 1,74.
[29] *Ibid.*
[30] *Ibid*., 74-75.
[31] *Ibid*. 75.
[32] *Ibid.*
[33] *C.f.* P. Bartlett, *The Mental Capacity Act 2005*, 2nd edn (2008), 27: "The House of Lords addressed the issue by expanding the doctrine of necessity".

reasserted in *R* v. *Bournewood Community and Mental Health NHS Trust, ex parte L*[34] (‘*Bournewood* ’):

> The importance of [the function of the common law doctrine of necessity in justifying actions which might otherwise be tortious] ..was, I believe, first revealed in the judgments in *In Re F*...The concept of necessity has its role to play in all branches of our law of obligations- in contract (see the cases on agency of necessity), in tort (see *In Re F*...) and in restitution...and in our criminal law. It is therefore a concept of great importance. It is perhaps surprising...that the significant role which it has to play in the law of torts has come to be recognised at so late a stage in the development of our law[35]

it is difficult to discern any clear or overarching principle of necessity from the approaches taken by the courts in such cases. Third, that Lord Goff’s formulation and use of the doctrine of common law necessity in *Re F* is best regarded as an exercise in pragmatic, creative law-making to solve a pressing legal problem and restore the adequacy of the law, as Brooke LJ has described it, “a brilliant common law judge’s imagination running completely riot”.[36] As Lord Brooke has recognised, the truth of the matter is that, in *Re F,* “The Law Lords had invented a solution to fill up a gap in the law”.[37]

Recognition of the principle of necessity

Before I turn to look in more detail at the approach of the courts to the existence of necessity as a defence in civil and criminal litigation,[38] it should be

[34] [1999] 1 AC 458, 490.
[35] *Ibid.*
[36] Rt Hon LJ Brooke, “Patients, Doctors and the Law (1963-2003): A few reflections”, (2004) 17 *Medico-Legal Journal* 72, 74.
[37] *Ibid.*
[38] See below, 161-206.

noted that it has to be conceded that it has long been accepted both by early jurists and in the case law that, in principle, there were certain circumstances in which necessity might create new rules or justify breaking the strict rules of the law.[39] For example, Bracton observed that, "What is not otherwise lawful, necessity makes lawful",[40] a maxim which is referred to or quoted with approval in a number of subsequent cases.[41] Bacon also stated that "Necessity leads to privilege in respect of private law",[42] an opinion which was accepted by later writers, including Viner[43] and Noy.[44] Numerous examples of similar views being expressed may also be found in old case law.[45] For example, in the 1551 case of *Reniger* v. *Forgossa*,[46] Serjeant Pollard, on behalf of the defendant, argued that:

> …necessity shall be a good excuse in all laws and that all laws give place to necessity; for it is a common proverb, *Quod necessitas non habet legem*;[47] and therefore necessity shall be a good excuse in our law and in every other law.[48]

In *Mouse's Case,*[49] Coke accepted that it was in the public interest that men should be kept safe and that the conservation of human life was a public good, which might

[39] G. Williams, "The Defence of Necessity" [1953] *CLP*. 216, 218.
[40] *"Id quod alias non ect licitum, necessitas vincit legem"*, F. 93b, 247a.
[41] E.g. *Case XXXV*, Jenk 19; *The Bishop of Salisbury's Case* 10 Co. Rep. 61a.
[42] F. Bacon, *A Collection of some Principal Rules and Maximes of the Common Lawes of England* (1630), (London: Assigneees of J. More Esq.), 160, Regula V: "*Necessitas inducit privilegum quoad jura private".*
[43] C. Viner, *General Abridgement of Law and Equity* (1741-1753), 534-536.
[44] W. Noy, *Treatise of the Principall Grounds and Maximes of the Lawes of this Kingdom* (1821). For further examples of legal maxims relating to necessity see: Anon (A Gentlemen of the Middle Temple), *The Grounds and Rudiments of Law and Equity*, (1751), 216-217, 290.
[45] The examples discussed below are referred to in Williams (n.39), 218.
[46] (1551) 1 Plowd. 1
[47] "Necessity knows no law". Originally attributed to Syrus, Publilius, a 1st century BCE Roman Dramatist.
[48] (1551) 1 Plowd. 1, 18.
[49] (1608) 12 Co. Rep. 63

in certain instances override strict legal rules.[50] Further examples of courts specifically recognising that necessity could sometimes provide a defence where the letter of the law was broken, may be found in *Moore* v. *Hussey* ("…all laws admit certain cases of just excuse, when they are offended in letter, and where the offender is under necessity…");[51] *Manby & Richards* v. *Scott* ("…the law for necessity dispenses with things which otherwise are not lawful to be done, …"),[52] and *The Gratitudine* ("Necessity creates the law, it supersedes rules; and whatever is reasonable and just in such cases is likewise legal").[53]

Recognising that, in principle, there might be situations in which necessity could justify breaking the law, is relatively straightforward. Establishing the parameters of any defence of necessity and whether the defence should apply to a specific fact-situation is much more difficult. First, there is the problem of ascertaining whether the necessity is genuine: it has long been recognised that this may be difficult to discern and that necessity might act as an excuse for the pursuit of selfish interests,[54] or as a cloak for tyranny, being used as a justification for interfering with individual rights.[55] History is littered with examples of necessity being used (or rather abused) to justify the ill-treatment and killing of men, women

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[50] *Ibid.*: *"Quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur; Interest reipublicae quod homines conserventur; Conservatio vitae hominis est bonum publicum"*.
[51] (1609) Hob. 93, Hobart J, 96.
[52] (1672) 1 Lev. 4, Twysden and Mallett JJ, 4-5.
[53] (1801) 2 C. Rob. 240, Sir William Scott, 266.
[54] *E.g.* O. Cromwell, Speech to Parliament, 15.9.1654:
> "Necessity hath no law. Feigned necessities, imaginary necessities,...are the greatest cozenage that men can put upon the Prudence of God, and make pretences to break known rules by."

[55] *C.f.* Pitt the Younger, Speech, House of Commons, 18.11.1783:
> "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants, it is the creed of slaves."

and children, an illustration of the which may be found in the infamous case of *Gregson* v. *Gilbert*,[56] in which the plaintiffs claimed that one hundred and fifty slaves had been thrown overboard a ship and left to drown, out of necessity, because the ship had been become delayed in its voyage, and water was running short.[57]

Second, where necessity is being relied upon as a defence, the claim is not one of strict or absolute necessity. As Glanville Williams has noted, "A particular act is never necessary, in the sense that there is literally no option, even though the only alternative is one's death",[58] and similar observations had been made previously by Hobbes:

> The example of him that troweth his goods out of a ship into the sea, to save his person, is of an action altogether voluntary: for, there is nothing there involuntary, but the hardness of the choice…[59]

A defendant claiming that they acted out of necessity, is essentially arguing that, faced with a choice between two 'evils', namely a difficult factual situation which posed a threat to life,[60] or personal safety,[61] or welfare,[62] or to property,[63] or the interests of another,[64] and the 'evil'of transgressing the civil or criminal legal norms, they chose the lesser evil of breaking the law. But, as Glanville Williams has noted

[56] (1783) 3 Dougl. 232. *C.f.* above, (n.39), 224.
[57] The plaintiff subsequently bought an action upon a policy of insurance in respect of the ship's cargo, seeking to recover the value of the slaves. The court ordered a new trial so that the question of whether there was sufficient necessity might be considered.
[58] Williams (n.39), 223-224.
[59] T. Hobbes, *Elements of Law*, (1640), 71
[60] See *e.g. R* v *Dudley and Stephens* (1884-1885) LR 14 QBD 273.
[61] *E.g. Mouse's Case* (1608) 12 Co Rep 240.
[62] *E.g. Southwark LBC* v *Williams* [1971] Ch 734.
[63] *E.g. Cope* v *Sharpe (No.2)* [1912] 1 KB 496.
[64] *E.g. Monsanto* v *Tilly* [2000] Env LR 313.

in his seminal article upon 'The Defence of Necessity', the choice here is essentially between competing values:

> ...necessity as a 'lesser evil' defence inevitably involves a choice of the lesser evil. It requires a judgment of value, an adjudication between competing "goods" and a sacrifice of one to the other. The language of necessity disguises the selection of values that is really involved.[65]

The difficulty faced by the courts when adjudicating in a particular case and deciding whether a defendant should be permitted to argue a defence of necessity, or whether such a defence should succeed, is in deciding, where values compete, which should be accorded priority. The decision is relatively straightforward in cases where it is evident that one value is of a higher order than the other. For example, it is uncontroversial that the preservation of human life ought to take priority over the preservation of property.[66] The choice of values is difficult where the court is asked to choose between competing values that are equivalent, for example, between the property rights of an owner of land over those of his neighbours.[67] It is still more problematic where the choice is between competing values of entirely different orders:

> To what physical inconvenience should a man submit in order to keep holy the Sabbath? Is a belief that an arrestable offender will commit suicide rather than stand his trial, a justification for impeding his apprehension?[68]

As we shall see, public interest is the key element when courts are making this choice of value and determining whether the harm/benefit resulting from action which breaches a legal norm outweighs the harm/benefit which would result from

[65] Williams (n.39) 224.
[66] *Mouse's Case* (1609) 12 Co Rep 63. Below, 174-175.
[67] *Cope* v *Sharpe (No.2)* [1912] 1 KB 496, below, 183-184.
[68] P.R. Glazebrook, "The Necessity Plea in English Criminal Law" (1972A) 30 *CLJ* 87, 91.

observing the norm.[69] It should, however be recognised that, although the reported decisions indicate that the public interest is determinative of whether a defence of necessity succeeds, to the extent that action which is regarded as being contrary to the public interest will not be justified by the courts, public interest will not in itself always be sufficient to justify action upon the basis of necessity, and it may be constrained by other factors such as the principle of autonomy or the principle of the sanctity of human life or superior private interests.[70] For example, if the harm/benefit analysis was purely a consequentialist one, with public interests trumping private ones, public interest could potentially be used to justify compulsory blood transfusions or participation in medical research, or the donation of regenerative tissue or organs or part organs such as kidneys or liver lobes, on the part of healthy citizens, to save the lives of others or further significant public health.[71] Yet the interference with personal autonomy were such a course to be taken would be so grave that it is generally accepted that such conduct would not be held to be lawful under English law.[72]

Necessity prior to *Re F*: civil claims

Necessity has been recognised as a defence to actions in the torts of trespass and nuisance, although it appears that it probably does not extend to actions in

[69] W. Wilson , *Central Issues in Criminal Theory* (2002), 299.
[70] *Ibid.*
[71] *C.f.* Law Com. No. 83 (1977), para.4.27.
[72] S. Gardner, "Necessity's Newest Inventions" (1991) 11 *OJLS* 125-135, 132; Wilson (n.69), 299-300; *c.f.* A. Brudner, "A Theory of Necessity" (1987) 7 *OJLS* 339-340, 358-65; A.P. Simester, "Necessity, torture and the rule of law", in V.V. Ramraj (ed.) *Emergencies and the Limits of* Legality (2008) 289, 297-298.

negligence.[73] An analysis of the early cases in which necessity was put forward as an *ex post facto* defence to a civil law claim in tort does not reveal with any precision either the ambit of necessity as a defence to such a claim or the elements of the defence. Such cases tend to be rather thin on the ground,[74] and in some of them necessity is not specifically referred to, although it is apparent that that is the defence that is being argued.[75] There has been relatively little detailed academic discussion of necessity as a defence in tort, and the defence is discussed fairly briefly in the leading tort textbooks, suggesting perhaps that the authors do not regard it as being a defence of importance in modern times.[76] The basis of the defence has been described as "a mixture of charity, the maintenance of the public good and self-protection".[77] Certainly, in the rare cases in which necessity has been raised as a defence, the courts have not generally discussed the doctrine in any depth when considering the relevant principles,[78] and it has not always been entirely clear from the facts of such cases whether the particular intervention is being performed in the public interest, or as a matter of self-help, or perhaps even a mixture of both.[79]

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[73] S. Deakin, A. Johnston and B. Markesinis, *Markesinis and Deakin's Tort Law*, 6th edn. (2008), 506. In *Rigby* v *Chief Constable of Northamptonshire* [1985] 1 WLR 1242 a dangerous psychopath who was trying to evade capture took refuge in the plaintiff's shop. Police fired a CS gas canister into the shop to try and flush the man out, but they did so without making sure that adequate fire-fighting equipment was available, and the canister caused a fire which led to the shop being burnt out. It was held that necessity could be a defence to trespass in such an emergency situation, but the police were held to be liable in negligence for firing the canister without ensuring that adequate fire-fighting back-up was available. See also: *Southport Corp.* v *Esso Petroleum* [1954] 2 QB 182 (CA) Singleton LJ, 194, Denning LJ, 198; [1956] AC 218 (HL), Lord Radcliffe, 242.

[74] *C.f.* W.V.H.Rogers, *Winfield & Jolowicz, Tort*, 18th edn. (2010), 1169, who describes the authorities as being "fairly scanty"(1168).

[75] *E.g.* Y.B. 22 Lib.Ass., pl.56.

[76] *E.g.* Deakin (n.73), 504-506 and 926; Rogers (n.74) 1092-1096; J. Murphy, *Street on Torts* (2007) 12th edn., 305-306, 483. The leading article in this context is Williams (n.39).

[77] Rogers (n.74) para. 25-30.

[78] *C.f.* J.Hall (1960) *General Principles of Criminal Law*, 2nd. Edn., 416.

[79] See *e.g. Gedge* v *Minne* (1792) 2 Bulstrode 60.

Even in modern times, there is "a surprising dearth of authority as to the nature and limits of necessity as a defence in tort."[80]

Public necessity

As I have indicated,[81] Lord Goff in *Re F* referred to there being a group of cases in which the principle of necessity had been historically applied to justify "a man interfering with another man's property in the public interest",[82] termed by him "public necessity".[83] Most of these cases involve damage to or the destruction of property to prevent the spread of fire. Given the dangerous nature of fire, the risk of it spreading and causing loss of life, particularly in densely populated areas, and the difficulties of bringing large conflagrations under control, particularly in times when properties were constructed with more flammable materials and there was no organised fire service, it is unsurprising that the courts have decided that there are circumstances where individual property interests may be sacrificed in order to promote the greater good of minimizing danger to the public.

This "public necessity" justification has been judicially accepted more often than it has been applied. For example, in the *Saltpetre Case*[84] it was accepted by Coke that:

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[80] *Rigby* v *Chief Constable of Northamptonshire* [1985 1 W.L.R. 1242, Taylor J, 1252.
[81] Above, 157-159.
[82] [1990] 2 AC 1, 74.
[83] *Ibid.*
[84] (1606) 12 Rep 12, 13. *C.f.* Y.B. T. 13 H. 8, f.15. Pl 1, at f.16a; Y.B. T.21 H. 7, f.27b, pl.5, Kingsmill J.

> For the commonwealth, a man shall suffer damage; as for saving a city or town, a house shall be plucked down if the next be on fire…and a thing for the commonwealth every man may do without being liable to an action.[85]

Whilst in both *Maleverer* v. *Spinke*[86] and *Mouse's Case*[87] it was accepted that the pulling down of a house "in time of fire",[88] as a firebreak, was justified as being in the public interest.[89] It appears to have been applied in *Dewey* v. *White*,[90] which indicated that the defence was not merely confined to steps taken to limit or put out a fire. In that case, a house had been damaged by fire, leaving the chimneys in a dangerous state, at risk of collapsing on to the highway and nearby properties and causing death or injury and the defendants, who were firemen belonging to the British Fire Office, removed the chimneys, which fell upon the plaintiff's property, causing damage. It was held that the defendants' actions were justified and that they were not liable to pay damages to the plaintiff. However, the court appears to have regarded the fact that the defendants were firemen and under a duty to act by virtue of their position as significant and it is not clear whether the same conclusion would have been reached had the defendants been ordinary members of the public:

> In analogy to the doctrine of nuisances, and the cases of captains of ships throwing overboard the cargoes to save the lives of the crews, I think it was the duty and right of these defendants to remove these chimneys, and to prevent their remaining to endanger the lives of Her Majesty's subjects.[91]

These cases suggest that the defence is confined to emergency situations, where the public interest requires that private property interests be interfered with in

[85] *Ibid.*, 13.
[86] (1537) 1 Dyer 32.
[87] (1609) 12 Co Rep 63.
[88] *Ibid.*
[89] *Ibid.*
[90] (1827) M & M 56. *C.f. Surocco* v *Geary* (1853) 3 Cal 69.
[91] *Ibid.*, Rede CJ, 57.

order to preserve life and limb. However, with the development in more recent times of organised emergency services, the distinction hinted at in *Dewey* v. *White*[92] between those under a duty to act in the public interest and ordinary members of the public has become a more entrenched feature of the defence, as may be seen from comments made by Lord Upjohn in *Burmah Oil Co. Ltd.* v. *Lord Advocate*:[93]

> No doubt in earlier times the individual had some such rights of self-help or destruction in immediate emergency, whether caused by enemy action or fire, and the legal answer was that he could not in such circumstances be sued for trespass on or destruction of his neighbour's property. Those rights of the individual are now at least obsolescent. No man now, without risking some action against him in the courts, could pull down his neighbour's house to prevent the fire spreading to his own: He would be told that he ought to have dialled 999 and summoned the local fire brigade.

According to this view, which was recognised by Lord Goff in *Re F*,[94] it appears that private individuals are no longer justified in interfering with land, even if it is done to prevent the spread of fire, the existence of the modern emergency services having limited the scope of any justification based upon public necessity. Post *Re* F, this approach has been confirmed in *Monsanto* v. *Tilly*,[95] where Mummery LJ suggested that the defence would only apply in very rare instances:

> …even in cases of emergency, trespass by the individual, in the absence of very exceptional circumstances, cannot be justified as necessary or reasonable, if there exists a public authority responsible for the protection of the relevant interests of the public…In such cases the right of the individual to trespass out of necessity, whether as defender of his own or a third party's interest, or as champion of the public interest, without attempting to enlist the assistance of the public authority, is obsolete.[96]

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[92] Above (n.90).
[93] [1965] AC 75, at 164.
[94] [1990] 2 AC 1, 74.
[95] [2000] Env. L.R. 313 (CA).
[96] *Ibid*., 338.

The message of the courts in recent times has been clear: now that we have emergency services a person must contact the relevant authorities rather than indulging in self help or wading in as a public champion, save possibly in the rare cases in which there is a reasonable and imminent[97] need to infringe property rights in order to preserve life, or to avoid serious injury.[98] There are several possible rationales for this limitation, although they have not fully been explored by the courts. First, that there is no necessity for a private individual to act to protect the public interest where there are organised emergency services to do so on their behalf.[99] Second, that the defence only extends to conduct which is, in the circumstances, reasonable, and given the existence of emergency services, it is not reasonable for an individual to intervene.[100] Third, an individual who took it upon himself to act in such circumstances might be considered to be acting 'officiously', and it is apparent from a number of cases that officious action will not be held to be justified.[101] For example, in *Carter* v. *Thomas*,[102] the appellant, a member of a

[97] It is not entirely clear from the authorities whether the danger need be immediate or, less onerously, imminent. In *Monsanto*, Pill LJ referred both to the need for the danger to be "imminent" and to the requirement that it be "immediate" (335), whilst Stuart-Smith LJ referred to the danger being "immediate" (327). *C.f. Southwark LBC* v *Williams* [1971] 1 Ch. 734, Lord Denning, 742 ("imminent danger") and Edmund Davies LJ, 745, ("Imminent peril"). It is submitted that imminence is the preferable test.

[98] *Monsanto* v *Tilly* [2000] Env. L.R., Stuart-Smith LJ, 327-328; D. Elvin and J. Karas , *Interference With Land*, 2nd edn. (2002) 74-75. *C.f.* Rogers (n.74), 1093, who suggests that "...it would require the most exceptional circumstances for a private person to destroy another's property to prevent the spread of fire".

[99] *Ibid*, 327-328.

[100] *Ibid. C.f. Re F* [1990] 2 AC 1, Lord Goff, 75, and the discussion re 'private necessity', below 172-189.

[101] *Kirk* v *Gregory* (1875-76) LR 1 Ex D 55: A close relative of the deceased had removed some of the deceased's jewellery and placed it in a box in another room for safe keeping. Some of the jewellery disappeared and the relative was sued by the executor for trespass to goods. The defendant sought to argue that it was necessary to remove the goods for their protection. Whilst the court accepted that an interference with goods for their protection which was reasonably necessary and reasonably carried out was justified: "The law cannot be so unreasonable as to lay down that a person cannot interfere for the protection of such things as rings and jewellery in the house of a man just dead", it was held that since there was no evidence that the goods were in jeopardy or that interference with them was

volunteer fire brigade, tried to force his way into a house that was on fire in order to assist the fire brigade. In doing so, he assaulted a member of the fire brigade, who had been instructed not to allow anyone into the building. Although it was accepted that he had used no more force than was necessary to enable him to enter the premises,[103] it was held that he had been lawfully excluded from the premises and that the appellant who "had no public position, and had no direct authority to enter on the premises"[104] therefore could not justify his officious actions in attempting to force an entrance.[105]

Private necessity, public necessity or something else?

The second group of cases to which Lord Goff referred were those which he termed "cases of private necessity":[106] "when a man interfered with another's property to save his own person or property from imminent danger".[107] A review of these cases discloses that, although necessity has been raised in a number of cases, it has rarely been successful. The attitude of the courts appears to be similar to that stated in Blackstone's Commentaries:[108]

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reasonably necessary, the defence failed. See also: *Carter* v *Thomas* [1893] 1 Q.B. 673; *Kirby* v *Chessum* [1914] 30 TLR 660 (Defendant unable to justify trespass where there was a danger of a wall collapsing but the danger was not so imminent as to make it reasonably necessary to enter the plaintiff's property and carry out the work without first obtaining his consent).

[102] [1893] 1 Q.B. 673.

[103] *Ibid.* , 674. The Appellant sought to rely upon *Maleverer* v *Spink* (1537) 1 Dyer 32, arguing that he was justified in forcing his way into the premises, so that he could assist with fighting the fire.

[104] *Ibid.*, Kennedy J, 678.

[105] *C.f. Kirby* v *Chessum* (n.101), 660.

[106] [1990] 2 AC 1, 74.

[107] *Ibid.*

[108] W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (1765), 135. This passage was approved by Mummery LJ in *Monsanto* v *Tilly* as reflecting very much the "fundamental principle of the common law": (n.98), 339.

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.

The inherent difficulty with permitting necessity as a defence is that, since it amounts to an argument that, given the circumstances of the case, the strict legal rules should not apply to the defendant's actions, if given too much scope, the defence has the potential to undermine existing legal norms, creating legal "anarchy".[109] It may be argued that the maintenance of a coherent system of property ownership and tenure depends upon the law relating to property rights being clear and permitted exceptions to the law being kept to a minimum. In the light of this, it is unsurprising that the courts have sought to limit the application of the defence. Alternatively, it has been argued that the reluctance of the courts to tolerate any interference with property rights may be seen as an instance of the judiciary, who were members of the social elite which included the property owners, consciously or unconsciously protecting the elitist interests of their own class,[110] and defining the public interest from that class's viewpoint.[111] Whichever view is accepted, in cases involving interference with property, defendants who have argued that their actions

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[109] *C.f. Southwark LBC* v *Williams* [1971] Ch 734, Edmund-Davies LJ, 746: "...necessity can very easily become simply a mask for anarchy".

[110] *E.g.* A. Norrie, *Crime, Reason and History*, 2nd edn. (2001), 20-28; *c.f.* M. Foucault, *Discipline and Punish* (1979), 85-87; E.P. Thomson, *Whigs and Hunters* (1975), 21.

[111] J.A.G. Griffith, *The Politics of the Judiciary*, 5th edn. (1997), 336:

> …their interpretation of what is in the public interest and therefore politically desirable is determined by the kind of people they are and the position they hold in our society; that this position is a part of established authority and so is necessarily conservative, not liberal. From all this flows that view of the public interest which is shown in judicial attitudes such as tenderness to private property…

Griffith does not, however accuse the modern judiciary "of a conscious and deliberate intention to pursue their own interestsor the interests of their class": *ibid.*, 334. Some support of this approach may be found in the ancient cases relating to trespass to kill rabbits and interference by commoners with the terre-tenant's land: see below: 176-178, 181-182.

were necessary have generally not been successful, save in cases of emergency where either life is at stake or a significant public interest is engaged.

As I have previously indicated,[112] the application of a defence of necessity to the facts of a case involves making a choice between competing values[113] and selecting which one should be given priority, a task which is much easier when the value which the defendant's actions are seeking to protect may evidently be regarded as being of a higher moral order than that promoted by the defendant's actions.[114] The clearest examples of this may be found in cases in which property has been damaged or trespassed upon in order to save human life, where the courts have recognised that property rights may be interfered with where human life is at risk.

For example, in *Mouse's Case*[115] passengers were being conveyed by barge from Gravesend to London, when a "great tempest"[116] arose and goods needed to be jettisoned from the vessel to prevent those on board from being drowned. One of the passengers took it upon themselves to throw a casket belonging to Mouse overboard in order to lighten the barge, and other passengers followed suit, jettisoning other goods. It was held that: "in case of necessity, for the saving of the lives of the passengers, it was lawful to the defendant, being a passenger, to cast the casket of

[112] Above, 164-166.
[113] Williams (n.39) 224.
[114] See *e.g. Esso Petroleum Co Ltd* v *Southport Corporation* [1956] AC 218, Devlin J, 228, discussed below, 175. *C.f. Southwark LBC* v *Williams* (n.109).
[115] (1609) 12 Co Rep 63. See also: *Reniger* v *Forgossa* (1551) 1 Plowden 1; *Burns* v *Nowell* (1880) 5 QBD 444.
[116] (1609) 12 Co Rep 63.

the plaintiff out of the barge, with the other things in it".[117] More recently, in *Esso Petroleum Co. Ltd.* v. *Southport Corporation*,[118] which has been described as the leading case upon necessity as a defence in tort,[119] an oil tanker became stranded in a river estuary and, as both the ship and the lives of the crew were in danger, and to prevent her breaking her back, the master jettisoned 400 tons of oil cargo, which was carried by the tide to the foreshore, causing damage. The shipowners were sued in trespass, nuisance and negligence and a number of matters were raised by way of defence,[120] including that "it was necessary to discharge oil from the *Inverpool* in order to protect the vessel and lives of those on board her...".[121] The trial judge, Devlin J upheld the defence of necessity, ruling that:

> The safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon another's property.[122]

Although this ruling was overturned by the Court of Appeal, who found the shipowners to be liable in negligence, the House of Lords subsequently restored Devlin J's judgment, the latter's findings re necessity being expressly approved by Earl Jowitt, who accepted that "the fact that it was necessary to discharge the oil in the interest of the safety of the crew afforded a sufficient answer to the claim based on trespass or nuisance".[123] In *Rigby* v. *Chief Constable of Northamptonshire*,[124] Taylor J. regarded this case as providing "clear authority for the application of

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[117] *Ibid.*
[118] [1956] AC 218.
[119] *Rigby* v *Chief Constable of Northamptonshire* [1985] 1 WLR 1242, Taylor J, 1252; approved in *Austin* v *The Commissioner of Police of the Metropolis* [2005] EWHC 480, Tugendhat J, [55].
[120] [1956] AC 218, 220-222, re details of the claim and defence.
[121] *Ibid.*, 222.
[122] *Ibid.*, 228.
[123] *Ibid.*, 235.
[124] [1985] 1 W.L.R. 1242.

necessity as a defence to trespass especially where human life is at stake".[125] Where, however, the danger was less than grave and imminent, the tendency has been for the defence to be rejected, as for example, was the case in *Southwark* v. *Williams*,[126] where it was held that the threat to welfare posed by the defendants being in dire need of housing accommodation did not justify their trespass to property so that they could reside there as squatters.

However, these cases illustrate the difficulty in attempting to draw a bright line between cases of public and private necessity, as they may also be regarded as public necessity, reflecting "the public interest in preserving life".[127] This difficulty is also apparent in the old reported cases in which the defence of necessity has been raised where the plaintiff has sued for damages for trespass to land because the defendant has entered the plaintiff's land to hunt animals considered to be pests. In *The Case of the King's Forester* in 1520, Brooke J. stated that: "…if I come into your land and kill a fox, a gray,[128] or an otter, I shall not be punished for this entry, because they are beasts against the common profit".[129] This implies that such

[125] *Ibid.*, 1253.
[126] [1971] Ch 734.
[127] Murphy (n.76), 306.
[128] A badger: G. Williams (n.39), 220, fn.28.
[129] *The Case of the King's Forester* Y.B.M. 12 H. 8, 10a pl2; (200) 119 S.S. 42, 24. The principal question in the case concerned the property of a stag, which had been killed in hunting, so this comment was obiter. The question of what animals were considered to be vermin was not value-free and appears to have reflected the property interests of the landowners. In particular, rabbits (called 'conies', sometimes spelt as "coneys" or "conyes" in the reports. See *e.g.Coney's Case* (1653) Godbolt 122; *Ould and Conyes Case* (1687) 4 Leonard 7) were not regarded as vermin, even though they could cause considerable damage to crops, apparently because their meat and pelts could be sold for profit by the landowner (*Hoddesdon* v. *Gresil* (1792) 1 Yel 104; *Bellew* v. *Langdon* (1600) Cro. Eliz. 876, 78 ER 1100. It was held that commoners were not entitled to justify the killing of rabbits by necessity, even if the rabbits ate so much of the pasture that there was insufficient for the commoner's cattle to graze upon: *Coney's Case* (1653) Godbolt 122, Suit J, 124. For a discussion of this case, see G. Williams, *Liability for Animals* (1939), 238.

animals are pests and that the public benefit to be obtained by their destruction outweighed the evil done by the trespass, but hunting might also be conducted by or on behalf of a landowner not to protect his own private property interests.

In any event, the courts have more recently curtailed the use of the defence of necessity to justify trespass for the purpose of pest destruction, even in the public interest, illustrating that "what may be justified in one age is not necessarily justified in another".[130] For example, in *Gundry* v. *Feltham*[131] it was accepted that trespass upon another's land whilst following a fox with hounds was justified, provided that it was the "only means of killing the fox",[132] and the hunter did "no more than is absolutely necessary".[133] Hunting, if it was to be justified, was therefore severely limited, with the defendant bearing the burden of proving that the interference with the plaintiff's property interests was the minimum necessary in the circumstances. The use of necessity to justify trespass during the course of fox hunting was apparently firmly curbed in *Paul* v. *Summerhayes*,[134] with Lord Coleridge C.J.

[130] Rogers (n.74), 1093.
[131] (1786) 1 T.R. 334.
[132] *Ibid.*, Buller J, 338.
[133] *Ibid. C.f. Gedge* v *Minne* (1792) 2 Bulstrode 60: The defendant, who had pursued a badger with dogs on to the plaintiff's land, dug the animal out of the ground and killed it,sought to justify his trespass by arguing that he had acted "for the good of the common wealth". This defence failed, the court drawing a distinction between cases where a man, in pursuit of vermin entered land without consent, which might be justified, and cases where land was entered for the purpose of finding vermin, in which case there would be a trespass if the entry was without consent. The court indicated that the defendant's actions might have been justifiable if he had been in pursuit of the badger before he trespassed upon the plaintiff's land, but that this defence failed because it had not been properly pleaded. In particular, the defendant, to succeed in such a defence would need to plead that he could only have caught the badger by digging him out, as opposed to other methods which were less damaging to the land, such as "by smoking him out, or by using of terriers to get him out" (62). Williams regards this ruling as being a pragmatic compromise: (n.39) 220.
[134] [1878] 4 QBD 9. The appellants had been foxhunting and were pursuing a fox, when they sought to enter land belonging to the respondent's father. The respondent resisted their entry and was assaulted by the appellants. The justices convicted the appellants of assault and they appealed by way of case stated to the Divisional Court.

expressing the opinion that: "There is no principle of law that justifies trespassing over the lands of others for the purpose of foxhunting".[135] Since foxhunting was a sport, with the object of killing the fox being only collateral to the main object, which was the interest and excitement of the chase,[136] it had to be conducted "in subordination to the ordinary rights of property."[137] Lord Coleridge went so far as to cast doubt upon "…the validity of the justification even where the only object is the destruction of a noxious animal",[138] observing that the comments of Brooke J. in *The Case of the King's Forester*[139] were a "mere dictum".[140] Williams has suggested that these comments about foxhunting or the pursuit of vermin and the law of trespass may be regarded as *obiter,* and that it is still arguable that trespass for the purpose of killing vermin such as rats, which are a nuisance, is justified.[141] However, in the light of the more recent approach taken by the courts in relation to the control of fire,[142] it appears that such an argument would not succeed today: there are local authorities with statutory powers to deal with pest control and resort should be had to them.

The position is further complicated because in some of the reported cases which have been discussed by commentators as being illustrations of the principle of necessity, these is not merely a question mark over whether the defendant is acting to protect their own person or property, or to protect public interests, but it may be

[135] *Ibid.*, 11. *C.f.* Mellor J, 12.
[136] *Ibid.*
[137] *Ibid.*, Lord Coleridge CJ, 10.
[138] *Ibid.*, 11.
[139] Above, 176-177.
[140] [1878] 4 QBD 9, 11.
[141] Williams (n.39), 221. The main issue in the case was whether assaults committed were justified.
[142] Above, 169-170; *Monsanto* v *Tilly* (n.98).

argued that the defence being applied is not necessity, but other defences, such as private defence,[143] or prevention of crime.[144] For example, in *Scott* v. *Shepherd*[145] the defendant threw a lighted squib into a busy market-house, where it fell on to the gingerbread stall of a man called Yates. A person named Willis then threw the squib across the market-house, where it fell upon one Ryal's stall. Ryal, to save his own goods from being damaged, threw the squib to another part of the market-house, where it exploded, blinding the plaintiff in one eye. The defendant was found to be liable to the plaintiff for trespass and assault, but Gould J. and De Gray CJ. considered that neither Willis nor Ryal would have been liable for removing the danger from themselves to another, since they were "acting under a compulsive necessity for their own safety and self-preservation".[146] Rogers has noted that the

[143] At common law the reasonable use of force to defence oneself, those for whom one is reasonably responsible and one's property, is a defence to an action in tort. Re self-defence, see *e.g. Cockroft* v *Smith* (1705) 2 Salk 642; *Moriarty* v *Brooks* (1843) 6 C & P 684; *Lane* v *Holloway* [1968] 1 QB 379; *Cross v Kirkby* (2000) *The Times*, April 5; *Turner* v *MGN Pictures Ltd* [1950] 1 All ER 449, Lord Oaksey, 471: "If you are attacked by a prize-fighter you are not bound to adhere to the Queensbury rules in your defence". In the recent decision of *Ashley* v *Chief Constable of Sussex Police* [2008] UKHL 25, [2008] AC 962, HL confirmed that the test for the defence in tort is not the same as the criminal defence of self defence: self defence can be raised in civil battery claims if the defendant can show that he mistakenly but honestly and reasonably thought it necessary to defend himself against an imminent threat of attack or actual attack and provided that the amount of force used was reasonable. Re defence of another: *Handcock* v *Baker* (1800) 2 Bos & P 260; *Coupey* v *Henley* (1797) 2 Esp 539. Murphy, (n.76), 302, suggests that in almost all cases the "general right to intervene to prevent a criminal attack on another" is provided for by the Criminal Law Act 1967, s.3. Re defence of property, see *e.g.*: *Holmes* v *Bagge* (1853) 1 E & B 782; *Dean* v *Hogg* (1834) 10 Bing. 345; *Tullay* v *Reed* (1823) 1 C & P 6; *Revill* v *Newbury* [1996] QB 567. For a discussion of these defences, see: Rogers (n.74),1088-1091, Murphy (n.76), 301-304.

[144] Under the Criminal Law Act 1967, s.3, one may use "such force as is reasonable in the prevention of crime". This appears to extend beyond the common law,as it is not clear whether there is a common law right to use force to resist an attack on a stranger: Murphy (n.76), 304-305.

[145] (1773) 2 Black. W. 892. *C.f. Handcock* v. *Baker* (1800) 2 Bos. & Pul. 260; 126 ER 1270, where the defendant broken into the plainitff''s house and had assaulted and falsely imprisoned the Plaintiff to prevent him from killing his wife. His actions were held to be justified as being 'necessary' to prevent murder (Lord Eldon, 263; Heath J., 264; Rooke and Chambre JJ, 265), but the justification in this case might be regarded as being reasonable prevention of crime rather than necessity, since the defendant acted in response to actual or threatened violence on the plaintiff's part.

[146] *Ibid*., De Gray CJ, 900. *C.f.* Gould J, who stated that "The terror impressed upon Willis and Ryal excited self-defence...What Willis and Ryal did, was by necessity, and the defendant imposed that necessity upon them." (at 898).

judges did not attach any particular technical meaning to "necessity" or "self-preservation",[147] and considers the case as being one of private defence rather than necessity. The two defences are similar, in that in both the defendant is acting to protect person or property, and in both there is a requirement that the defendant's action be proportionate, and the distinction between the two has not been clearly laid down by the civil courts, but necessity has been seen as differing from private defence "in that in necessity the harm inflicted on the claimant was not provoked by any actual or threatened illegal wrong on the claimant's part and that what the defendant did may be entirely for the good of other people and not necessarily for the protection of himself or his property."[148]

Even in cases which appear to fall more clearly into Lord Goff's classification of 'private necessity' where necessity has been used to justify interfering with "another's property to save his own person or property from imminent danger",[149] the courts have kept a very tight rein upon the use of necessity as a defence to actions for interference with property: the early cases do not make it clear when a person may justifiably interfere with another's property rights, policy issues seem to play a large part in whether action is justified, and generally

[147] Rogers (n.74), 1168.
[148] *Ibid.*, 1168-1169. *C.f.* C. Sapideen and P. Vines, *Fleming's The Law of Torts*, 10th edn. (2011) 108, who regard necessity as differing from self-defence "in that it justifies action adverse to the interests of someone who is not in any way responssible for creating the threat to the actor; and from inevitable accident, because injury to the innocent party is an intended or at least highly probably consequence." According to these analyses, the actions of Willis and Ryal might be regarded as being justified by necessity, since the injured plaintiff was an innocent third party. Murphy, (n.76), 305, has suggested that the defence of property "presupposes that the claimant is *prima facie* a wrongdoer", whilst necessity "contemplates the infliction of harm on an innocent claimant.
[149] [1990] 2 AC 1 , 74.

interference with another's land has been held not to be justified, even if it was for the property owner's benefit, save in cases of genuine emergency.

This reluctance to permit interference with other's property rights was apparent in *Harecourt* v. *Spycer*,[150] where an action in trespass was brought by a terre-tenant,[151] against a commoner who had dug a trench upon the common land in order to drain off flood water. The court was divided as to whether the commoner's actions were justified, with Broke and Elyot JJ. deciding that they were not, and that a commoner was not entitled to intermeddle with the terre-tenant's land without leave, even if he acted for the benefit of the terre-tenant.[152] Elyot J. In particular regarded the circumstances in which a person was entitled to interfere with another person or with his goods as being severely limited:

> With respect to a man's person, it is not lawful for anyone to touch it forcibly unless he is in such great danger that he will perish without help: in that case one can beat a man to save the life of another, and it is justifiable. Thus a servant may justify battery in saving the life or limb of his master. So may a husband for his wife. These things are when someone is in danger; but otherwise one may not intermeddle with the person. With goods, however, it is [never] lawful for anyone to intermeddle. It is not lawful for someone to enter my land without my leave, for even if his presence benefits me it may not suit my pleasure. Thus, driving beasts out of my corn, without my leave to enter the land, is wrong.[153]

The other judges considered that the commoner's actions were justified. Pollard J. adopted an approach which apparently regarded a wide range of action conducted

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[150] (1520) Y.B., T.12 H.8 2a, pl 2 and Y.B., T.13 H.8, 15a, pl 1; (2002) 119 S.S. 7-19, 81-85.
[151] A person who has actual possession of land; the occupant of land: OED Online, http://dictionary.oed.com (accessed 07.03.2009).
[152] (2002) 119 S.S. 7, 8-9. Broke J was of the opinion that the plaintiff could only recover minimal damages because it "must be assumed" that the trench was for his benefit (at 8).
[153] *Ibid.*, 9.

for the benefit of the terre-tenant as being justified, an approach which goes much further than being a justification of strict necessity, bearing more similarity to a "best interests" approach:

> …if I am in danger of being murdered in my close, or in my house, it is lawful for anyone to break my house or close in order to help me, because it is for my benefit. Likewise, if I see beasts in your corn, I can enter and drive them out…if someone is so poor that he cannot plough his own land, and I plough and sow his land and reap his corn, I shall not be punished, because it is for the other person's profit. It follows that the commoner may do something for the advantage of the terre-tenant without being punished. Thus, he can dig up mole-hills, because that is for the benefit of the terre-tenant. Or he can make a causey[154] if the water is so deep that the cattle cannot reach the common. Or he can dig a pit for the cattle to water in. And because this is a benefit, even though it is done without permission, he shall not be punished. Similarly, if someone brings me a present, or comes to me for counsel and gives me something for my labour, or visits me when I am sick, he shall not be punished, because even if it is against my will the law presumes that I will not be displeased, since it is for my profit and a benefit to my land."[155]

The difficulty with this broader approach is that it appears to extend the defence much further than other reported cases, and potentially it opens the door to all manner of officious action by interfering busybodies, upon the basis that it is for another's benefit. It is therefore not surprising that it has not been the prevailing view in subsequent cases, with the strict approach being the one more commonly favoured. [156]

[154] Causeway.
[155] (2002) 119 S.S. 7, 8-9; *c.f.* Brudenell CJ, 10.
[156] Williams (n.39) 221-222. *C.f. Monsanto* v. *Tilly* (n.98), where "'direct action' by self-appointed guardians of what they perceive to be the public interest" was held not to be justified: Rogers (n.74) 1092.

Private necessity: interference with land

In common with the cases previously discussed in which a defence of necessity has succeeded, the relatively few cases in which necessity has justified interfering with another's property to protect one's own property, or that of an employer,[157] have involved one-off emergency situations, where action to prevent harm to property is reasonably required. For example, in *Cope* v. *Sharpe (No. 2)*,[158] a serious heath fire had broken out upon the plaintiff's land, and the defendant, a gamekeeper, set fire to strips of heather between the main fire and an area in which pheasants were nesting, in order to protect game belonging to his master, who had been leased sporting and shooting rights over the land. The plaintiff brought an action for trespass against the defendant, who sought to rely on necessity to justify his acts.[159] The Court of Appeal ruled that the defendant was entitled to succeed, upon the basis that the justification for the trespass was to be judged "upon the state of things at the moment at which the interference takes place, and not upon the inference as to necessity to be drawn from the event",[160] the action taken by the defendant was "necessary to meet the threatened danger",[161] and the steps taken were reasonable:

> The test is not whether, if the defendant had not done those acts, the danger would in fact have resulted in injury. Neither is it whether the defendant believed that it would have resulted in injury. The test,...is whether,...there was such real and imminent danger to his property...that he was entitled to

[157] *Cope* v *Sharpe* [1912] 1 KB 496.
[158] *Ibid. C.f. Cope* v *Sharpe* [1910] 1 KB 168, in which the Divisional Court sent the case back for a re-trial because the trial judge had not found as a fact whether or not the defendant's act was necessary.
[159] [1921] 1 KB 496, 498-499.
[160] *Ibid.*, Kennedy LJ, 507.
[161] *Ibid.*, Kennedy LJ, 505.

> act and whether his acts were reasonably necessary in the sense of acts which a reasonable man would properly do to meet a real danger.[162]

It has also been said that an individual may also take steps to prevent his property from imminent dangers such as flood, for example by raising banks or barricades on his property to divert water, even if that leads to his neighbour's land becoming flooded,[163] although recent cases dealing with this issue appear not to have been expressly decided upon the principle of necessity.[164]

Action to assist another without consent

Lord Goff's third category of necessity related to "action taken as a matter of necessity to assist another without his consent". [165] To illustrate this category he referred to a classic emergency rescue situation, that of "a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death". But he also suggested that there were many other examples of this legal principle to be found, in a wide range of situations involving: "the preservation of the life or health of the assisted person,...the preservation of his

[162] *Ibid.*, Buckley LJ, 504. *C.f.* Kennedy LJ, 510. This principle was described as being "one of general application to justifications of acts of trespass..", in *Cresswell* v *Sirl* [1948] 1 KB 241, Scott LJ, 248.
[163] Rogers (n.74), 1093.
[164] *Home Brewery Plc* v *William Davis & co (Leicester) Ltd* [1987] QB 339 (occupier of lower land entitled to take reasonable steps to prevent water from higher land entering his land, even though that led to the flooding of the higher land, but action in nuisance would lie where lower land's user unreasonable and damage to higher land reasonably foreseeable). *C.f. Green* v *Somerleyton* [2003] EWCA Civ 198, [2004] 1 P & CR 33. In *Greyvensteyn* v *Hattingh* [1911] AC 355 (a South African appeal), the defendants were held to be entitled to drive locusts away from their own lands and in the direction of the respondents' lands as a matter of self protection, but necessity is not expressly mentioned in the judgment.
[165] [1990] 2 AC 1, 74.

property (sometimes an animal, sometimes an ordinary chattel) and even to certain conduct on his behalf in the administration of his affairs".[166]

First, it must be noted that this category of necessity cases appears to be drawn so widely as to include some of the cases which might be regarded as falling within the categories of 'private necessity' and 'public necessity' discussed above, illustrating the difficulty of categorising the authorities into neat classifications.[167] Second, it is apparent from the reports of many of the cases which might be regarded as falling within this category that they involve what would appear to have been regarded at the time by the court as pressing situations requiring imminent intervention,[168] and would not now be regarded as being justified, illustrating that both the public interest and necessity may change over time.[169]

Authorities which might be regarded as falling within this class of cases include a number of old cases in which necessity appears to have been used to justify the detention and forcible treatment (although it would now be regarded as ill-treatment) of the mentally disordered, although again, it has been raised more often than it has succeeded. In a case in 1348,[170] the Plaintiff was in a "mad fit and doing great harm".[171] The Defendant and certain relations of the Plaintiff, "took him

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[166] *Ibid.*
[167] *E.g. Mouse's Case* (1608) 12 Co Rep 63.
[168] *E.g. Scott* v *Wakem* (1863) 3 F & F 883; *Leigh* v *Gladstone* (1909) 26 TLR 139.
[169] See the cases discussed above at 169-170, 177-178.
[170] Y.B. 22 Lib. Ass., pl.56; *C.f.* J.H.Baker and S.F.C. Milsom, *Sources of English Legal History: Private Law to 1750* (1986) 311-312 and S.F.C. Milsom, "Trespass from Henry III to Edward III", (1958) 74 *LQR* 561, 581. The Plaintiff pleaded *de injuria*, that the defendant had committed the battery, not as a cause of the facts alleged, but out of his own wrongdoing.
[171] Y.B. 22 Lib. Ass, pl 56.

and tied him up and put him in a house and chastised him and beat him with a rod",[172] and subsequently sought to justify this action as being by way of treatment,[173] but it is not clear from the report what the outcome of the case was.[174] The eighteenth century case of *R* v. *Coate*,[175] involved two unfortunate women who, with the collusion of their husbands, had been placed in the defendant, Coate's "private house for the reception of persons disordered in their minds."[176] Lord Mansfield, observing that since private madhouses were not governed by any legal authority, "the circumstances must govern therefore",[177] suggested that where individuals took upon themselves "an act of authority not allowed by the law",[178] "necessity alone"[179] could serve as an excuse. On the facts of the case, however, such necessity was not found proven.[180] Subsequently, in *Scott* v. *Wakem*,[181] the plaintiff alleged that the defendant surgeon had unlawfully assaulted, falsely imprisoned and restrained him. It was argued on behalf of the defendant that, at the relevant time, the plaintiff, who was suffering from "a fit of delirium tremens",[182] had called the defendant in to assist him, and that all that the defendant had done was provide necessary medical treatment. It was accepted that at common law, a

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[172] *Ibid.*
[173] During this period there was no consensus as to the origins of mental disorder or how to treat it. Whilst a few lucky individuals might be treated with care and concern, others might be treated by bleeding, exorcism or 'shock treatment': for example, by throwing the 'madman' into a river : R. Porter, *The Greatest Benefit to Mankind: A medical history of humanity from antiquity to the present* (1999) 127-128. *C.f.* K. Dalton, "Notes on the History of Mental Health Care", (1999, new material added 2003), Mind website: http://www.mind.org.uk (accessed 7.1.2009).
[174] Above (n.171).
[175] (1772) Loft 73.
[176] *Ibid.*
[177] *Ibid.*, 74.
[178] *Ibid.*, 75.
[179] *Ibid.*
[180] *Ibid.* 75-76.
[181] (1862) 3 F & F 328.
[182] *Ibid.*

medical man could justify taking measures which were necessary to restrain a dangerous lunatic or a person suffering from delirium tremens "not merely at the moment of the original danger, but until there was reasonable ground to believe that the danger was over."[183] The jury apparently decided that no sufficient necessity existed upon the facts of the case, since they found for the plaintiff.[184] The defendants were more successful in *Symm* v. *Fraser*,[185] an action in which the plaintiff alleged that the defendants, two medical men, had entered her home and assaulted and unlawfully restrained and imprisoned her. Her allegations were denied by the defendants, who argued that their actions were necessary as part of the Plaintiff's medical treatment. Cockburn C.J. appears to have summed up the case to the jury very much in the defendants' favour, recognising that there were significant policy issues involved, and that the practice of medicine might be hampered if doctors were in fear of being sued and exhorting the jury to remember this, both at the beginning of his address and at the end:

> This case was of great importance involving as it did the question of how far medical men, acting honestly and to the best of their judgment for the good of their patients, were responsible; …the jury ought jealously to watch over and uphold the personal liberty of the individual, yet…they ought to be equally careful not to impede the efficacy of medical assistance by exposing medical practitioners to harassment by vexatious actions.[186]
> …In conclusion,…the Lord Chief Justice desired them to consider the case, not only with reference to the interests of the individuals committed to the care of medical men, but also with a view to the interests of the public, taking care not to impede or neutralize the energy and usefulness of medical assistance by exposing medical men unjustly to vexatious and harassing actions.[187]

[183] *Ibid.*, Bramwell B, 333.
[184] *Ibid*., 334-335. The jury awarded damages of one farthing.
[185] (1863) 3 F & F 883.
[186] *Ibid*., 879.
[187] *Ibid*., 884.

Given such a direction, it is perhaps not surprising that the jury found for the defendants. Lord Goff, who was referred to these last three cases during the course of argument in the *Bournewood* Case,[188] indicated that he regarded all of them as providing:

> …authority for the proposition that the common law permitted the detention of those who were a danger, or potential danger, to themselves or others, in so far as this was shown to be necessary.[189]

A further case which might be seen as falling within this category is *Leigh* v. *Gladstone*.[190] Mrs Leigh, a sufragette, had been convicted of disturbing a political meeting and of resisting the police and, having been on hunger strike in prison, had been force fed by the prison authorities. She claimed damages for assault and an injunction to prevent further force feeding. Lord Alverstone CJ rejected her appeal, on the basis that the prison authorities had a duty "to preserve the health and lives of the prisoners who were in the custody of the Crown"[191] Although he accepted that it would have been an assault if she had been unnecessarily force fed, in the light of the medical evidence it was necessary and lawful, because "it had become dangerous to allow her to abstain from food any longer".[192] However, at that time the lawfulness of the force-feeding of prisoners was not questioned: suicide was a felony, and the backdrop to the case was a tense political conflict between the women's franchise movement and the Government,[193] so the case may be seen as

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[188] [1999] 1 AC 458, 490.
[189] *Ibid.*
[190] (1909) 26 TLR 139.
[191] *Ibid.*, 140.
[192] *Ibid.*, 141.
[193] The lawfulness of force feeding was not questioned in the case, the issue was whether it had been appropriately used: G. Zellick, "The forcible feeding of prisoners: an examination of the legality of enforced therapy" (1976) *Public Law* 153, 161. *C.f. Sec. Of State for the Home Dept.* v *Robb* [1995]

being based upon policy considerations. Given these special circumstances, as Glazebrook has observed, it appears that the case "is not authority for any wider principle that injury may lawfully be caused to save a person from himself".[194] Even if the authority is regarded as being one where the plea of necessity succeeded, the case may be seen as one dealing with an "urgent situation of imminent peril",[195] and therefore not supporting an extension of the defence to less urgent circumstances.

In addition, there were a number of Canadian cases in which necessity had apparently been used to justify the provision of medical treatment without consent. In *Marshall* v. *Curry*,[196] where a surgeon, during the course of a hernia operation, removed without consent the plaintiff's left testicle because "it would be a menace to the health and life of the plainitiff to leave it."[197] Chisholm J. ruled that the removal of the testicle was lawful on the basis that it was "in the interest of his patient and for the protection of his health and possibly his life. The removal I find was in that sense necessary, and it would be unreasonable to postpone the removal to a later date",[198] although it is clear from the judgment that Chisholm CJ regarded the foundation of the justification in this case as being the duty owed to the patient by the surgeon:

> I think that it is better,...where a great emergency which could not be anticipated arises,...to rule that it is the surgeon's duty to act in order to save the life or preserve the health of the patient; and that in the honest execution

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Fam 127, Thorpe LJ, 130-131, where it is made clear that the case is "of no surviving application and can be consigned to the archives of legal history".

[194] Glazebrook (n.68), 99. See also G. Williams, *Criminal Law: The General Part*, 2nd edn. (1961), 234-235, who suggests that "the ruling can be supported only as an instance of prison authority or discipline".

[195] *Southwark* v *Williams* (n.109), Edmund-Davies LJ, 746.

[196] [1933] 3 DLR 260.

[197] *Ibid.*, Chisholm CJ, 262.

[198] *Ibid.*, 275-276.

> of that duty he should not be exposed to legal liability. It is, I think, more in conformity with the facts and with reason, to put a surgeon's justification in such cases on the higher ground of duty.[199]

In *Murray* v. *McMurchy*,[200] Macfarlane J appeared to focus rather more upon necessity when he stated that:

> I think the law is clear that if...[the treatment] were necessary as opposed to being convenient, for the protection of the life or even for the preservation of the health of the patient, the surgeon would be entitled to take the intended procedure.[201]

Although it was held that the circumstances of the case did not justify the surgeon proceeding without consent. If necessity is the justification being employed in these cases, it is evident that the courts intended to keep it within fairly tight constraints: unless the treatment was necessary to protect life or preserve health, the patient should be woken up and consent obtained.

Necessity as a criminal defence

There has been a good deal of academic discussion in relation to the issues of whether, in what circumstances, and to what extent, necessity might properly by used as a defence to a criminal charge.[202] These commentaries have not, however,

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[199] *Ibid.*, 275. The case was considered by Butler-Sloss in *re F*, [1990] 2 AC 1, 37. *C.f.* Lord Goff, 77.
[200] [1949] 2 DLR 442. *C.f. Parmley* v *Parmley and Yule* [1945] 4 DLR 81, where the patient had agreed to a tonsillectomy by a doctor and to have two teeth removed by a dentist at the same time and, whilst the patient was anaesthetised, the dentist removed all of the upper teeth and a lower molar without consent, it was held that both the doctor and the dentist were negligent: "Her position under the anaesthetic ...provided a convenient, but not a necessary, opportunity for the removing of her teeth"(Estey J, 89).
[201] *Ibid*., 443-444.
[202] See *e.g.* Williams (n.194), Ch.17; Glazebrook, (n.68); G. Fletcher, *Rethinking Criminal Law* (1978) 818-829; L. Leigh, "Necessity and the Case of Dr. Morgentaler" [1978] *Crim LR* 151; Brudner (n.72); M. Guy-Arye, "Should the Criminal Law Distinguish Between Necessity as a Justification and Necessity as an Excuse?" (1986) 102 *LQR* 71; P. Alldridge, "Duress, Duress of Circumstances and Necessity" (1989) 139 *NLJ* 911; S. Bannister and D. Milovanovic, "The Necessity Defence: Substantive Justice and Oppositional Linguistic Praxis" (1990) 18 *International*

been matched by a similar volume of case law. Bacon raised the prospect of the defence of necessity being available:

> First, for conservation of life: if a man steals viands to satisfy his present hunger, this is no felony nor larceny.
> So if divers be in danger of drowning by the casting away of some boat or bark and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither se defendendo, nor by misadventure but justifiable.
> So if divers felons be in gaol, and the gaol by casualty is set on fire, whereby the prisoners get forth, this is no escape, nor breaking of prison.[203]

By contrast, Hale[204] took the view that necessity because of hunger or poverty was not a defence to theft, but did recognise that the defence might be available in the case of a prisoner escaping from a burning gaol.[205] This approach was supported by Blackstone,[206] who was concerned about the potential for such a defence to imperil property rights: "for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others",[207] although he felt that the legal provision made for the poor was such that it was "impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature".[208] Hale's views were also approved in *Dudley and Stephens*,[209] where Bacon's 'plank'

Journal of the Sociology of Law 179; Gardner (n.72); Norrie (n.110), 153-173; J. Rogers, "Necessity, Private-Defence and the Killing of Mary" [2001] *Crim LR* 515; Wilson (n.69), Ch.10; C.M.V. Clarkson, "Necessary Action: A New Defence" [2004] *Crim LR* 81; S. Gardner, "Direct Action and the Defence of Necessity" [2005] *Crim LR* 371; S. Ost, "Euthanasia and the Defence of Necessity: Advocating a More Appropriate Legal Response" [2005] *Crim LR* 355; I. Dennis, "On Necessity as a Defence to Crime: Possibilities, Problems and the Limits of Justification and Excuse" [2009] 3 *Criminal Law & Philosophy* 29. In this Part, my discussion is focused upon the decided cases prior to *Re F* in which the defence of necessity had been used or raised and a review of this body of literature is beyond the scope of this study.

[203] *Elements of the Common Lawes of England* (1630). Cited and discussed by Glazebrook, (n.68), 110-111.

[204] *Pleas of the Crown* (1736), vol i, 54. *C.f. Southwark LBC* v. *Williams* (n.109).

[205] *Ibid.*, 611.

[206] W. Blackstone, *Commentaries on the Laws of England: Volume IV, Of Public Wrongs* (1769) 32.

[207] *Ibid.*

[208] *Ibid.*

[209] (1884-1885) LR 14 QBD 273, Lord Coleridge CJ, 283.

example was described as being unsupported by authority.[210] An examination of the Proceedings of the Old Bailey[211] of the late seventeenth and early eighteenth centuries suggests that Hale's opinion was reflected in practice: there are numerous reports of first-instance cases in which claims of necessity raised by defendants charged with offences of dishonesty are rejected.[212] There are a very few reported trials in which defendants making claims that they took goods out of necessity are acquitted. Since the reports are very brief and these were jury trials, the basis upon which these defendants were acquitted is not clear. However, it appears that rather than specifically recognising necessity as a defence, the juries involved were not satisfied that the defendants had the necessary 'felonious intent' because they were intending to redeem goods that had been pawned.[213]

In most of the relatively few criminal cases prior to *Re F* in which necessity has been raised as a defence, it has not succeeded. For example, in *R v. Stratton*,[214] the question arose during a political trial as to whether 'political necessity' had arisen for deposing the Governor of Madras, who had unlawfully refused to count

[210] *Ibid.*, 285.
[211] http://www.oldbaileyonline.org.
[212] *Ibid.* See *e.g. Ordinary of Newgate's Account* (OA16861217); *William Lodge* (T16920115-15); *John Allen* (T16931206-17); *Elizabeth Golding* (T17150427-67); *Christian Campbell* (T17150223-29); *Mary Harris* (T17170227-27); *Thomas Walker* (T17210419-39); *Robert Walton* (T17211206-64); *Richard Hedgly* (T17220404-4); *Thomas Sly* (T17220907-4).
[213] *Mary Burnet* (T17150114-20): "She did not deny the pawning...but said she did not do it with a felonious intent, only to supply a present necessity, and to fetch them again. The Jury considering her circumstances acquitted her". *Margaret Morris* (T17171016-16): "...she being necessitated, had pawned them for the support of her self and child, but did intend to redeem them and bring them home again...it appeared rather the effect of necessity and impudence than dishonesty, so the jury acquitted her".
[214] (1779) 21 State Tr. 1222.

the votes of certain members of the Council.[215] Lord Mansfield CJ directed the jury that the defence might possibly be available "in India, where there is no superior nigh them to apply to",[216] but that "in that case it must be imminent, extreme necessity; it must be very imminent, it must be very extreme".[217] The defendants were convicted. In *Vantandillo,*[218] where the defendant was indicted for causing a common nuisance by carrying her infant child, who was infected with smallpox, along the public highway, the defence failed on the basis that no evidence had been produced to establish that the defendant's conduct was necessary.[219] However, Lord Ellenborough accepted that necessity might be a defence to a charge of exposing an infected person in public, if it were necessary to carry a child through the street to see a doctor.[220]

The defence also failed in the infamous case of *Dudley* v. *Stephens*.[221] The crew of a yacht, *The Mignonette*, consisting of the defendants, a seaman named Brooks, and a young cabin boy, Richard Parker, were forced, following the wreck of their ship during a storm on the high seas, to put to sea in a small open boat with no water and very little food.[222] They managed to survive for some days by feeding off

[215] *Ibid. C.f.* H. Stephen, "Homicide by Necessity" [1885] 1 *LQR* 51, 54; Williams (n.194), 230-231; G. Fletcher (n.202), 823-827, where the case is discussed.
[216] (1779) 21 State Tr. 1222, 1223.
[217] *Ibid. C.f.* Williams (n.194), 231, who argues that the defence ought not to be available in such circumstances: "...indirect social evils are for the consideration of the legislature, and do not fall within the purview of the doctrine".
[218] (1815) 4 M & S 73, 105 ER 762.
[219] *Ibid.* 105 ER 762, Lord Ellenborough CJ, 763-4.
[220] *Ibid.* The defence did not succeed, partly because the defendant had not given any evidence to support it.
[221] (1884) 14 QBD 273. For discussion re the case see: A.W.B. Simpson, *Cannabalism and the Common Law* (1994); Fletcher (n.202), 823-827; Norrie (n.110), 156-159. *C.f. US* v. *Holmes* (1841) 26 *Fed Cas* 360.
[222] (1884) 14 QBD 273, 273-274.

a turtle that they had caught and drinking rainwater that they had collected, but by the time that they had been adrift for twenty days, their outlook was bleak and Parker was in a "helpless" and "extremely weakened" state.[223] Dudley, with Stephen's agreement, then killed Parker and the three men then fed upon his body and blood for four days, by which time they were rescued "in the lowest state of prostration".[224] At the trial of Dudley and Stephens for Parker's murder, it was argued that they had killed the boy "under the pressure of necessity",[225] with the intention "only to preserve their lives".[226]

The jury found, in a special verdict,[227] that the defendants "would probably not have survived"[228] if they had not fed upon the body of the boy, there being "no appreciable chance of saving life except by killing some one for the others to eat",[229] but that "assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men".[230] The judges of the Queen's Bench, pronouncing judgment on the jury's verdict, held that there was no proof of such necessity as would justify killing the dead boy, although the court clearly thought that the necessity of starvation did not justify murder.[231] Lord Coleridge expressed sympathy for the plight of the defendants: "the prisoners were subject to terrible temptation, to sufferings which might break down the bodily power of the

[223] *Ibid.* 274.
[224] *Ibid.*
[225] *Ibid.* 277.
[226] *Ibid.* 278.
[227] *Ibid.* 273.
[228] *Ibid.* 275.
[229] *Ibid.*
[230] *Ibid.*
[231] *Ibid.* 273, 283 and 287. In *Howe* [1987] AC 755, the HL confirmed that necessity was not a defence to murder: Lord Hailsham, 780. But *C.f. Re A* [2000] 4 All ER 961.

strongest man".[232] However, the admissibility of the defence was rejected. Whilst Lord Coleridge in his judgment emphasises the importance of upholding the moral principle of the sanctity of life which, in the circumstances, he saw as placing Dudley and Stephens under a duty to sacrifice their lives rather than preserve them by killing another:[233]

> Though law and morality are not the same,...yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were held by law an absolute defence of it...The duty, in cases of shipwreck, of a captain to his crew, of the crew to the passengers,...these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others....

However, it is suggested that more pragmatic consequentialist considerations are the driving force behind the judgment. First, there is the fear that the floodgates might be opened to unmeritorious claims, that "such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime".[234] Second, practical concerns about the difficulty of adjudging necessity in such cases: "Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured?".[235] Third, the judges knew when their judgment was handed down that, in spite of their rejection of the defence of necessity, the defendants would not be executed for their crime and that the harshness of the penalty imposed by law would inevitably be be tempered by administrative action.[236] The defendants were

[232] *Ibid.*, Lord Coleridge CJ, 279.
[233] *Ibid.* 287.
[234] *Ibid.* 288. See Norrie (n.110), 157; Williams (n.194) 741-745.
[235] *Ibid.* 287.
[236] Simpson (n.221), 239-248.

convicted and sentenced to death, but their sentence was very swiftly commuted to a term of six months' imprisonment.[237]

By contrast, the defence apparently did succeed in *Bourne.*[238] In that case, a fourteen year-old girl had been walking with friends along Whitehall when, as she passed the Horse Guards, a Guardsman stopped her and asked her if she would like to come inside and see "a horse with a green tail". [239] She went in with him and was brutally raped, as a result of which she became pregnant. The case having been referred to him by another doctor, Bourne, an eminent gynaecologist, performed an abortion on the girl with her parents' consent and was prosecuted under s.58 of the Offences Against the Person Act 1861 for the offence of unlawfully using an instrument to procure a miscarriage.[240] His defence was that the abortion was not unlawful because the continuance of the pregnancy would probably cause serious injury to the girl. The trial judge, Macnaghten J, in a summing up that was generally favourable to the defence, and which emphasised the professionalism and good faith of the defendant,[241] took the view that the Crown had to prove that the act "was not done in good faith for the purpose only of preserving the life of the mother":[242]

> if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the

[237] (1884) 14 QBD 273, 288.
[238] [1939] 1 KB 387. *C.f. Morgentaler* (1975) 20 CCC (2d) 449 (SCC), discussed by Leigh, (n.202).
[239] A. Bourne, *A Doctor's Creed* (1962), .97. For an account of the case see: J. Keown, *Abortion, Doctors and the Law: Some aspects of the legal regulation of abortion in England from 1803-1982*, (1988), 49-52; D. Seaborne Davies, "The Law of Abortion and Necessity" [1938] *MLR* 126, G. Williams, *The Sanctity of Life and the Criminal* Law (1958), 151-152,165-166 and *Textbook of Criminal Law,*2nd edn. (1983), 295-296.
[240] [1939] 1 KB 687, 687-688.
[241] *Ibid.* 690.
[242] *Ibid.* 694. The case is also reported at [1938] 3 All ER 615, although there are significant differences between the two reports. *C.f.* Williams (1958), (n.239), 152.

> pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother... [243]

It is apparent from his summing up that Macnaghten J did not fear that permitting such a defence to doctors would lead to more widespread and unmeritorious reliance upon the defence being made by abortionists. A clear distinction is made between the member of the medical profession, who could be trusted to "properly perform such an operation",[244] and who would not "venture to operate except after consulting some other member of the profession of high standing",[245] and the backstreet abortionist, to whom the defence was denied.[246] Macnaghten's direction appears to be based upon a respect for the expertise of doctors and an underlying assumption that fellow professionals can be trusted to act within the law.[247] The defence could therefore be permitted in these circumstances without fear that it might get out of hand.

As Wilson has observed, although Macnaghten J did not specifically mention the defence of necessity, "the only plausible basis for the direction is an implicit defence of necessity", [248] and the direction was said by Glanville Williams to be "a striking vindication of the legal view that the defence of necessity applies not only to

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[243] *Ibid.*
[244] *Ibid.*, 695.
[245] *Ibid.*
[246] *Ibid.*, 687-688, 695.
[247] See above, 81, 83-84.
[248] W. Wilson, *Criminal Law: Doctrine and Theory*, 4th edn. (2011), 248-249. *C.f.* D. Ormerod, *Smith and Hogan's Criminal Law*, 13th edn. (2011), 367, who suggests that the case should be regarded as one of duress of circumstances.

common law but even to statutory crimes".[249] This was only a first instance case and it proceeded no further precisely because the jury acquitted Bourne, so there was no opportunity for an appellate court to consider the ambits of any defence of necessity. However, the case was relied upon by the medical profession in practice and in subsequent prosecutions of doctors prior to the enactment of the Abortion Act 1967.[250]

Prior to the emergence of the defence of duress of circumstances in the 1980's,[251] the question of the availability of necessity as a defence was raised in a number of cases involving the commission of road traffic offences by drivers of emergency vehicles, but the defence invariably either failed or was held to be inadmissible. The most notable instance of this was the case of *Buckoke* v. *GLC,*[252] which arose out of disciplinary proceedings taken against a number of Fire Brigade members who objected to a London Fire Brigade order which provided instructions in relation to disobeying traffic light signals on the way to an emergency.[253] However, during the appeal, Lord Denning raised the question of whether a driver crossing a red light in order to save life might be able to rely on the defence of necessity if he were to be prosecuted.[254] Counsel for both sides agreed that necessity did not provide a defence in such circumstances, but was merely a matter of mitigation, and this was accepted by Lord Denning, although he felt that "such a

[249] Williams (1958), (n.239), 152.
[250] *R v Bergmann and Ferguson* (1948) 1 *BMJ* 1008, where Morris J adopted Macnaghten J's approach in *Bourne*; Williams (1958), (n.239), 154, 165. *R v Newton and Stungo* [1958] *Crim LR* 469, discussed in J. Havard, "Therapeutic Abortion" [1958] *Crim L R* 600.
[251] See below, 202-204.
[252] [1971] Ch 655.
[253] *Ibid.*, 665-667.
[254] *Ibid.*, 668.

man should not be prosecuted".[255] Lord Denning suggested that justice should be achieved in such cases either by the exercise of prosecutorial discretion not to prosecute or, if a prosecution were brought, by the imposition of an absolute discharge.[256] A similar approach was taken in the cases of *Lundt Smith*,[257] and *O'Toole*,[258] which concerned ambulance drivers who were involved in accidents as a result of driving through red lights whilst on emergency calls: on appeal, both appellants were absolutely discharged. In the case of *Wood v. Richards*,[259] a police officer convicted of driving without due care and attention whilst on his way to an emergency was absolutely discharged, but neverthless appealed against his conviction, arguing that he should be permitted to rely on the defence of necessity. Eveleigh J., dismissing the appeal, did not entirely exclude the availability of the defence in such cases, but suggested that there would first have to be evidence that an appropriate level of emergency existed: "the defence of necessity to the extent that it exists must depend on the degree of the emergency or the alternative danger to be averted".[260]

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[255] *Ibid.*

[256] *Ibid.* 668-669. Where an absolute discharge is made, the conviction is deemed not to be a conviction for any purpose other than the purposes of the criminal proceedings in which it is made: Powers of Criminal Courts (Sentencing) Act 200, s.14 (replacing previous legislation to the same effect). Williams (1983), (n.239), 600-601, re a discussion of the issues in relation to the giving of an absolute discharge where the defendant breaks the law out of necessity.

[257] [1964] 2 QB 167.

[258] (1971) 55 Cr App R 206.

[259] (1977) 65 Cr App R 300.

[260] *Ibid.*, 303. *C.f. Johnson v Phillips* [1976] 1 WLR 65, where it was held that a police officer exercising his common law power to control traffic was under a duty to require other persons to disobey traffic regulations to protect life or property. A motorist who ignored a constable's request to reverse the wrong way up a one-way street in such circumstances was properly convicted of obstructing the officer in the execution of his duty. Alldridge (n.202) suggests that "the decision implies (not very strongly)" the existence of a defence of necessity.

In some instances, even though the defence was potentially arguable, it appears to have been overlooked, ignored, or perhaps rejected by the defendant's legal representatives on the basis that it would either be ruled to be indamissible, or would not succeed. For example, in *Kitson*,[261] it appears not to have been raised to defend a charge of driving under the influence of drink where a passenger in a car had woken up to find that the driver had disappeared and the car was moving downhill, and had grabbed the steering wheel to try and control the car, bringing the car to halt on a verge, about 300 yards further on. This was in spite of the fact that the defendant was evidently placed in a situation where immediate action was required to minimise danger to others.[262]

A review of these cases fails to reveal a coherent principle of necessity running through the criminal law. Many of the cases are first instance authorities of little weight and in the vast majority of the cases the defence failed (or was held to be inadmissible) and the defendant was convicted. The cases reveal more about when the defence will not apply than about the theoretical basis and scope of such a defence: it appears that it will generally only apply in "very extreme"[263] emergency situations.[264] Since it was held not to apply where one kills in order to prevent oneself and others from starving to death,[265] or when an ambulance[266] or fire

[261] (1955) 39 Cr App R 66.
[262] Williams has commented that: "Apparently the court preferred that he should have done nothing and allowed the car to run away, perhaps doing serious injury to life or damage to property": (n.194), 727. *C.f.* Glazebrook (n.68), 96.
[263] *Stratton*, (n.214).
[264] *Wood v Richards* (n.259).
[265] *Dudley and Stephens* (n.222).
[266] *Lundt Smith* (n.257), *O'Toole* (n.258).

tender[267] drives through a red light in answering a 999 call, both of which might usually be regarded as situations of extreme emergency, it is difficult to predict from these cases when the defence might be admitted. What the cases do reveal is that the use of the defence is hedged about by pragmatic and policy considerations, in particular, the fear that admitting the defence will lead to the unravelling of existing legal norms and to "anarchy",[268] and concerns about the difficulty of choosing between competing values, particularly where they are of different orders.[269] In 'hard' cases, such as *Dudley and Stephens*, in which it was accepted that most men would have given way to the "terrible temptation"[270] faced by the defendants, and *Bourne*, in which the defendant was faced with a choice between staying safely within the letter of the law and refusing to treat, or courting the risk of prosecution by operating to preserve life, the outcome may be seen as a form of pragmatic 'fudge'. As Sinclair has observed, the courts in such cases appear to be trying to balance the moral tensions involved in such cases with the practical considerations involved in opening the door to claims of necessity.[271] This is done by placing strict curbs upon the availability of necessity as a defence, whilst at the same time adopting what may be regarded as 'backdoor' methods to achieve justice. For example: by the use of prosecutorial discretion,[272] neutralising the effect of the

[267] *Buckoke v GLC* (n.252).
[268] *Southwark v Williams* (n. 109).
[269] Above, 164-166.
[270] Above, 193-195.
[271] D. Sinclair, *Jewish Biomedical Law* (2003), 223.
[272] *C.f. Buckoke v GLC* (n.252).

conviction by sentencing the defendant to an absolute discharge,[273] exercising the prerogative of mercy,[274] or 'summing up for an acquittal'.[275]

The emergence of duress of circumstances

In the 1980s a form of necessity defence began to emerge in a series of cases involving driving offences, but the courts made it clear that this defence of 'duress of circumstance' was subject to tight limits and doctrinally was very similar to the defence of duress by threats.[276] In *Willer*,[277] the defendant had driven (albeit slowly) on a pavement to escape from a gang of youths who he feared would inflict violence upon him and his passenger. At his trial for reckless driving, the judge had refused to leave a defence of necessity to the jury. The Court of Appeal ruled that the judge had erred by not allowing the jury to decide whether the issue of necessity arose at all, but declined to decide whether the defence was in fact applicable, since they considered that the appropriate defence in the circumstances was duress, rather than necessity.[278] In *Conway*,[279] which also concerned an allegation of reckless driving, the conviction was quashed because the defence of 'duress of circumstances' had not been left to the jury. The appellant accepted that his manner of driving might well have been reckless, but claimed that he had only driven in this manner because he

[273] *Ibid.; Lundt Smith* (n.257); *O'Toole* (n.258); *Wood v. Richards* (n.259).
[274] *Dudley v Stephens* (n.222).
[275] *Bourne* (n.238).
[276] See *e.g.* Ormerod (n.248), 362-365 for a discussion re the elements of this defence, which has recently been tightly circumscribed, following the decision of the HL in *Hasan* [2005] UKHL 22, [2005] 2 AC 467.
[277] (1986) 83 Cr App R 225.
[278] *Ibid.*, 227, Watkins LJ, 227.
[279] [1989] QB 290. See *e.g.* C.E. Bazell, "Reckless driving- defence of necessity or duress of circumstances" (1989) 53 *J Crim L* 173.

honestly believed that his passenger was in danger from a potentially fatal attack.[280] Woolf LJ recognised that it was "still not clear whether there is a general defence of necessity or, if there is, what are the circumstances in which it is available", but accepted that the defence of 'duress of circumstances' was available in certain circumstances:

> ...necessity can only be a defence to a charge of reckless driving where the facts establish 'duress of circumstances'...*i.e.*, where the defendant was constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or some other person.[281]

Conway was followed in *Martin (Colin),*[282] where the defendant, who was disqualified from driving, had driven his stepson to work. He stated that he had done this because if he had not done so, his wife, who had suicidal tendencies, had threatened to kill herself. It was made clear that "the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately to avoid a threat of death or serious injury".[283] The Court of Appeal held that the trial judge had erred in ruling that a defence of necessity was not available: the defence of duress of circumstances ought to have been left to the jury.[284] The principles in relation to the defence were outlined as follows:

> English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress,...however, it can

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[280] *Ibid.* 293-294.
[281] *Ibid.* 297.
[282] [1989] 88 Cr App R 343. See *e.g.* D. Cowley, "Necessity as a defence" (1989) 53 *J Crim L* 291.
[283] *Ibid.*, Simon Brown LJ, 346. The effect of this limitation is that the defence will not be applicable if the defendant does not act reasonably, *e.g.* by continuing to drive once the peril has been averted: see *e.g. DPP v Jones* [1990] RTR 34; *DPP v Tomkinson* [2001] EWHC Admin 182, [2001] RTR 38; *R v Arnaot* [2008] EWCA Crim 121; D *v Donnelly* [2009] HCJAC 37; [2009] SLT 476. *C.f.* Ormerod (n.248) 363, and A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 4th edn. (2010) 734, who suggest that *Martin* can be regarded as a case of duress by threats.
[284] *Ibid.* 345.

> arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called "duress of circumstances."...the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.[285]

In *Willer*, *Conway*, and *Martin*, the Court of Appeal accepted the existance of duress of circumstances, a species of necessity defence, but the defence that emerges from these cases is one which is circumscribed, with its use being restricted to situations of "immediate peril",[286] where the defendant is effectively coerced to act.[287] These situations seem to be far removed from the medical scenario of doctors making a decision as to whether to treat an incapacitated patient. Even in instances where emergency treatment is required, such cases, as Dennis has observed, "look more like measured exercises of judgment than compelled responses to danger".[288]

Since the decision in *Re F*, the criminal courts have resisted suggestions that the defence of 'common law necessity' relied upon by Lord Goff in that case be extended to be available more generally as a criminal defence,[289] although academic writers have argued for the expansion of the defence of necessity.[290] The courts have also failed to provide a clear analysis of the doctrinal relationship between necessity and duress of circumstances. In the case of *R v Shayler*,[291] Lord Woolf CJ stated

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[285] *Ibid.* 345-346.
[286] Simester (n.283) 738.
[287] Wilson, (n.69), 316; Dennis (n.202), 31.
[288] Dennis (n.202), 35.
[289] *R v Quayle* [2005] EWCA Crim 1415, [2005] 1 WLR 3642.
[290] See *e.g.* C.M.V. Clarkson, "Necessary Action: A New Defence" [2004] *Crim LR* 81; S.Ost, "Euthanasia and the Defence of Necessity: Advocating a More Appropriate Legal Response" [2005] *Crim LR* 355; S. Gardner, "Direct Action and the Defence of Necessity" [2005] *Crim LR* 371.
[291] [2001] EWCA Crim 1977, [2001] 1 WLR 2206. On appeal, Lord Bingham stated [2002] UKHL1, [2003] 1 AC 247, [17]) that he should not be taken "to accept all that the Court of Appeal said on these difficult topics".

that: "the distinction between duress of circumstances and necessity has, correctly, been by and large ignored or blurred by the courts". The courts have, on a number of occasions either treated the terms 'necessity' and 'duress of circumstances' as if they were interchangeable,[292] or combined the terms, speaking of "necessity of circumstances",[293] or used the term 'necessity' when it appears that the defence under consideration is actually duress of circumstances.[294] In *Shayler*,[295] Lord Bingham described the law relating to necessity and duress of circumstances as "vexed and uncertain territory",[296] and in *Quayle*, Mance LJ took the view that no "coherent over-arching principle" was applicable in the cases of necessity to which the court had been referred.[297] The desire of the courts to maintain tight control over the applicability of any defence of necessity remains, for reasons expressed by the Court of Appeal in *Quayle*:[298]

> ..the defence of necessity...must be confined to narrowly defined limits, or it will become an opportunity for almost untriable, and certainly peculiarly difficult issues, not to mention abusive defences.[299]

As Norrie has observed, the fear is that the necessity defence, if admitted, will create a "Trojan Horse"[300] or a "Pandora's Box" for the criminal law, forcing the courts to

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[292] *Martin* (n.282); *R v Pommell* [1995] 2 Cr App R 607, Kennedy LJ, 614-615; *Hasan* (n.276), Lord Bingham, 494. Ormerod (n.248), 375.
[293] *Quayle* (n.289), Mance LJ [44].
[294] *R v S and L* [2009] EWCA Crim 85, [2009] 2 Cr App R 11. The defendants, who were charged with deploying unlicensed security guards, sought to rely upon the defence of necessity, arguing that they were compelled to employ unlicensed security guards because of fears of an imminent terrorist attack on the premises for twhich they were responsible. The Court of Appeal praised the trial judge's "immaculate judgment", in which he had set out "a clear and correct statement of the law of necessity" (at [3]). However, as both Ormerod (n.248, 723) and Wilson (n.248, 252) have observed, the defence here appears to be one of of duress of circumstances.
[295] (n.291).
[296] *Ibid*., [17].
[297] (n.289) Mance LJ[53].
[298] *Ibid*. See D. Ormerod, "Necessity of Circumstance" [2006] *Crim LR* 148 for further discussion of the case. This case is discussed further below, 288.
[299] (n.289), Mance LJ [53].

consider a wide variety of explanations for criminal conduct and potentially embroiling them in sensitive and difficult social, political and moral issues.[301]

Expanding necessity? Negotiorum gestio[302] and agency of necessity

As I have indicated, it is difficult, if not impossible to discern any overarching general principle of necessity from the decided cases. The general impression from such an investigation is that defendants relying upon such defences were very unlikely to succeed save in pressing situations where intervention was imminently reasonably required. It would have been very difficult indeed for a judge to extract from these authorities any principle of necessity which would justify the more general use of the justification outside the context of a specific emergency. However, as I have already indicated, Lord Goff turned to "the historical origins of the principle of necessity"[303] to demonstrate that these origins did "not point to emergency as such as providing the criterion of lawful intervention without consent",[304] drawing upon the Roman doctrine of *negotiorum gestio*,[305] and upon ancient common law cases "concerned with action taken by the master of a ship in distant parts in the interests of the shipowner",[306] and the doctrine of agency of necessity.[307]

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[300] Bannister and Milovanovic (n.202).
[301] Norrie (n.202), 160.
[302] The Latin phrase for'management of another's affair': J.P. Dawson, " Negotiorum Gestio: The Altruistic Intermeddler" [1961] *Harv LR* 817, 818.
[303] [1990] 2 AC 1, 74.
[304] *Ibid.*
[305] *Ibid.*, 74-75.
[306] *Ibid.*, 75.
[307] *Ibid.*

Briefly, the principle of *negotiorum gestio*, sometimes known as "benevolent intervention",[308] was that, if A, the manager or 'gestor', interfered in the affairs of B, the principal, without B's consent, then B could bring a 'direct action' (*action directa*) against A seeking compensation for harm done if A failed to complete the task once he had embarked upon it or to exercise due care in his administration, B might require A to account for profits received during his management of B's affairs. On the other hand, A could bring a 'reverse action' (*action contraria*) against B, claiming:

> ...recoupment of any proper expenditure, and indemnification from liabilities, but only if, in the circumstances, his intervention was reasonable, *i.e*. that the thing done was reasonable and that it was, in the circumstances or urgency, reasonable for him to step in and do it.[309]

According to Buckland and McNair, there is much dispute about the early history of the principle, which was more limited during the period of the early Roman Empire, so that only the absence of the principal justified the intervenor acting so as to give him a claim.[310] However, by the classical period, the *gestio* had been extended to include such matters as the provision of medical care for a slave or food for the absent principal's family, the purchase, sale or repair of property on behalf of the principal, and the payment of debts owed by, or collection of debts due to the principal.[311] Sheehan suggests that necessity was not essential for the doctrine to

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[308] M. Hogg, "Perspectives on contract theory from a mixed legal system" (2009) *OJLS* 643, 646.
[309] W.W. Buckland and A.D. McNair, *Roman Law and Common Law: A Comparison in Outline* (1952), 334. See also: J.P.Dawson (n.302), 819-820; E.W. Hope, "Officiousness" (1929) 15 *Cornell LQ* 25, 25-26, particularly fn.2 and S. Williston, "Agency of Necessity" [1944] XXII *Can Bar Rev* 492, 492 at fn.4.
[310] Above, (n.309), 819.
[311] *Ibid.*

apply, although the position appears not to be entirely settled, as some Roman sources suggest the opposite.[312]

One can see why Lord Goff drew the analogy between *negotiorum gestio* and the situation of an incapacitated adult who requires medical treatment or care, since both involve notions of benevolent intervention to assist another. However, the difficulty with relying upon this principle to support an extension of the principle or necessity in English law is that *negotiorum gestio* has traditionally not been recognised as being incorporated into English law. As Sheehan has observed, "It is not a concept that is familiar to English lawyers".[313] Certainly, in the leading case of *Falcke* v. *Scottish Imperial Insurance Co.*,[314] Bowen LJ seemed to deny the doctrine any general application in English law:

> The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.[315]

In recent times a persuasive case has been made "that it is a concept that can be seen taking shape in the common law",[316] but at the time of the decision in *re F* it appears

[312] D. Sheehan, "Negotiorum gestio: a civilian concept in the common law?" (2006) *ICLQ* 253, 258 and n.41.
[313] *Ibid.*, 253.
[314] [1887] LR 34 ChD 234. *C.f. Re Cleadon Trust Ltd* [1939] Ch 286, 321-322; *Leigh* v *Dickeson* (1884) 15 QBD 60, 64-65.
[315] *Ibid.*, 248. There are exceptions in relation to salvage, general average and contribution: Bowen LJ, 248. *C.f. Sorrell* v. *Paget* [1950] 1 KB 252, Bucknill LJ, 260; Hope (n.309), 26-27.
[316] Sheehan, (n.312), 278. *C.f.* J. Kortmann, *Altruism in Private Law* (2005), Pt.2; P.B.H. Birks, *Unjust Enrichment*, 2nd edn. (2005), 24.

not to have been an accepted doctrine in English law,[317] although it was seen as having similarities with agency of necessity.[318]

The doctrine of agency of necessity has particularly been used in mercantile law,[319] and, in cases where it has been held that an agency of necessity exists, there has generally been a pre-existing relationship between the parties.[320] An agency of necessity may arise where the agent, encountering a situation of emergency, acts in a manner which exceeds the actual authority which his principal has bestowed upon him. The agent of necessity may subsequently be able to bring a claim against the principal to recover reasonable expenses which he has incurred, or the reasonable value of goods supplied. To succeed, the agent must first satisfy a court that there was a situation of necessity or emergency that required her to act.[321] However, the courts have taken an approach which may be seen to be rather more favourable to the intervenor than that adopted by the courts in the cases where necessity has been pleaded as a defence to a tortious action, and have regarded mercantile or

[317] See *e.g. Falcke* (n.314); M.L. Marasinghe, "The Place of Negotiorum Gestio in English Law" (1976) 8 *Ottawa L Rev* 573, 574; L.J.W. Aitken, "Negotiorum Gestio and the Common Law: A Jurisdictional Approach" (1988) 11 *Sydney L Rev* 566, 597.
[318] Marasinghe (n.317) 573.
[319] A detailed examination of agency of necessity is beyond the scope of this study. See *e.g.* G. Jones *Goff & Jones The Law of Restitution* (Goff & Jones), 7th rev edn. (2009); I. Brown, "Authority and Necessity in the Law of Agency" (1992) 55 *MLR* 414.
[320] This is not necessarily always the case. It is much more difficult for a claimant intervening in a situation of necessity to recover from the defendant where there is not pre-existing relationship, but not impossible: *Falcke* (n.314).
[321] See *e.g. Tetley & Co.* v. *British Trade Corporation* (1922) 10 Ll L Rep 678; *John Koch Ltd.* v. *C & H Products Ltd.*[1956] 2 Lloyd's Rep. 59, Singleton LJ, 59. In *Surrey Breakdown Ltd v Knight* [1999] RTR 84, Sir Christopher Staughton, 88, the CA approved the following passage in an earlier edition of Goff & Jones: "Necessity must have compelled the intervention. The emergency must be so pressing as to compel interventionwithout the present owner's authority".

commercial necessity[322] as being sufficient:

> When by the force of circumstances a man has the duty cast upon him of taking some action for another, and under that obligation, adopts the course, which, to the judgment of a wise and prudent person, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken, that it was, in a mercantile sense, necessary to take it.[323]

In addition, it must have been either impractical or impossible for the claimant to obtain the principal's instructions at the time,[324] a requirement which is likely to be increasingly difficult to satisfy in a commercial context, given that we now have effective methods of speedy world-wide communication: agency of necessity will not arise if it is possible for the agent to communicate with his principal.[325] The "agent" must also have acted in the bona fide interests of the principal,[326] and her action must be reasonable and prudent in the circumstances of the case.[327]

The case law prior to *re F* in relation to agency of necessity shows some expansion of the doctrine, both in the requirements which have to be established for a claim of agency of necessity to succeed, and from its application in maritime

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[322] *E.g.* where goods are perishable and start to decay: *Sims & Co.* v. *Midland Railway Co.* [1913] 1 KB 103.
[323] *Australasian Steam Navigation Co* v. *Morse* (1872) LR 4 PC 222, Sir Montague Smith, 230.
[324] *Sims* (n.322), Scrutton J, 107 : "it must be practically impossible to get the owner's instructions in time as to what shall be done". However, in *China-Pacific SA* v. *Food Corporation of India*, Lord Diplock made it clear that this requirement would be satisfied where the defendants does not respond quickly enough to a claimant's request for instructions: [1982] AC 939, 961. See Goff & Jones (n.319), para 17-005.
[325] *Prager* v. *Blatspeil Stamp & Heacock Ltd.* [1924] 1 KB 566, McCardie J, 571-572. Sheehan has argued that there is still scope for the use of the doctrine "as our mutual interdepence increases", relying upon *re F* in support of this assertion: (n.312), 253, n.5. *C.f.* Goff & Jones (n.319), paras 17-015-17-016.
[326] *Prager* (n.325), 572.
[327] *Broom* v. *Hall* (1859) 7 CBNS 503; *Phelps, James & Co* v. *Hill* [1891] 1 QB 605; Williston (n.309), 501; Goff & Jones (n.319), para 17-006.

cases.[328] However, as Burrows has observed, this expansion "has left uncertain the perameters of agency of necessity".[329] The Court of Appeal in *Surrey Breakdown Ltd. v Knight* noted this general lack of doctrinal clarity and certainty in relation to agency of necessity in non-maritime cases, subsequent to the decision of the House of Lords in re F:

> The doctrine of agency of necessity is not wholly settled in English law. It is well established in maritime cases that there may be what is called officious intervention creating, as it were, an agency. Whether the same is the case on land is not settled.[330]

Conclusion

If a principle is to be regarded as a legal norm which is "relatively general",[331] then I suggest that, based upon the decided civil and criminal cases in which necessity appears to have been raised to "justify action which would otherwise be unlawful",[332] it is difficult to find any general, or even clear, principle of necessity running through the common law. Where the defence has been raised in criminal or civil cases, it has rarely succeded and when it has succeeded, that has tended to be in cases where the public interest supports the taking of imminent action. In addition, although it is clear that there is no one coherent defence of necessity running through either the civil or the criminal law, the number and extent of such 'necessity' defences and their relationship with other defences such as

[328] See *e.g.* the cases referred to at (n.324-325) above.
[329] A. Burrows, *The Law of Restitution*, 3rd edn (2011), 472.
[330] (n.321), 88.
[331] N. MacCormick, *Legal Reasoning and Legal Theory* (1978), 126.
[332] *Re F* [1990] 2 AC 1, Lord Goff, 74.

prevention of crime or private defence remains obscure.[333] As for the doctrines of *negotiorum gestio* and agency of necessity, a review of these doctrines makes it apparent why Lord Goff drew upon them in *re F*, because there were evident analogies to be drawn with the situation of the patient in *re F*, particularly in relation to the inability of the agent (doctor) to communicate with the principal (patient). However, these doctrines were by no means synonymous with the defence created by Lord Goff *re F* and the extent to which they applied in English law outside the scope of situations of emergency, in which there was a pressing need to compel intervention, was unclear.[334] To answer the problem raised by the case of *re F*, and establish Lord Goff's defence of 'common law' necessity, which was to be used to provide a lawful basis for providing both emergency and routine treatment and care to incapacitated adults, it is suggested that a creative leap was required.

[333] Dennis (n.202) 28, 31-32.
[334] *Surrey Breakdown Ltd v. Knight* (n.321).

Chapter 6

Why Necessity?

Introduction: medical treatment and incapacitated adults

In the case of adult patients who have capacity to consent to medical treatment, the position in law is clear: the consent of the patient is required if invasive treatment is to be lawful, since treatment given without consent will constitute the tort of trespass to the person and a criminal assault.[1] The principle in English law is that:

> A competent adult patient has an absolute right to refuse consent to any medical treatment or invasive procedure, whether the reasons are rational, irrational, unknown or non-existent, and even if the result of refusal is the certainty of death"[2]

A principle which has been reiterated in many cases,[3] and has been described by Mr. Justice Munby (as he then was) as being: "so well established in our law as no

[1] See *e.g.* E. Jackson, *Medical Law: Text, Cases and Materials*, 2nd edn. (2009), 216-217; J. McHale and M. Fox, *Health Care Law*, 2nd edn. (2007), 351-352; *Re R (Wardship)(A Minor: Consent to Treatment)* [1992] Fam 11, Lord Donaldson MR, 22; *Airedale NHS Trust* v. *Bland* [1993] AC 789, Lord Browne-Wilkinson, 882. However, although consent in such cases is required, it does not in itself provide sufficient justification for the lawfulness of medical treatment: see Jackson (n.1) 217-218; *Attorney General's Reference (No.6 of 1980)* (1981) 73 Cr App R 63, Lord Lane CJ, 66; *Brown* [1994] 1 AC 212 (HL), Lord Mustill, 266.

[2] *HE* v *A Hospital NHS Trust* [2003] EWHC 1017 (Fam), [2003] 2 FLR 408, Munby J, [20].

[3] See e.g. *W* v *W* [1972] AC 24, Lord Reid 43; *Sidaway* v *Board of Governors of the Bethlem Royal Hospital and the Maudesley Hospital* [1985] A.C. 871, Lord Scarman, 882, Lord Templeman, 904-905; *Re F* [1990] 2 AC 1, Lord Brandon, 55, Lord Griffiths, 70, Lord Goff, 72; *Bland* (n.1), Lord Keith, 857, Lord Goff, 864, Lord Browne-Wilkinson, 882, Lord Mustill, 891; *Re T (Adult: Refusal of Treatment)*[1993] Fam 95, Lord Donaldson MR, 115-116; *Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290, Thorpe LJ, 294; *Re MB (Medical Treatment)* [1997] 2 FLR 426, Butler-Sloss LJ, 432; *St. George's Healthcare NHS Trust* v *S* [1999] Fam 26, Judge LJ, 43-45; *Re AK (Medical Treatment:Consent)* [2001] 1 FLR 129, Hughes LJ, 133-134; *Re B (Consent to Treatment: Capacity)* [2002] EWHC 429 (Fam), [2002] 1 FLR 1090, Dame Elizabeth Butler-Sloss P, [16]-[21]. *C.f. Allan* v *New Mount Sinai Hospital* (1980) 109 DLR (3d) 634, and the much cited statement of Cardozo J in *Schloendorff* v *Society of NewYork Hospital* (1914) 105 NE 92, 95:

longer to require either justification or elaborate citation of authority".[4] As Grubb has observed in relation to this principle: "English law could not be clearer".[5]

The law has made provision for proxy consent to medical treatment to be given on behalf of children who are unable or unwilling to provide a valid consent:[6] an adult with parental responsibility[7] for a child may consent to treatment for that child,[8] or a court may authorise medical treatment by making an order under s.8 CA 1989, or under the court's inherent jurisdiction.[9] However, as I mentioned in Part II, because the former *parens patriae* jurisdiction in respect of incapacitated adults had ended,[10] prior to *Re F* there was no such provision in respect of adults who were incapable of giving a valid consent to medical treatment or care. As the law stood, no one could give proxy consent on behalf of an incompetent adult.[11]

As far as the position in relation to treatment provided to adults who lacked capacity to consent was concerned, although prior to *Re F*, it had been widely assumed and accepted that there were cases in which medical practitioners would be acting lawfully in treating incapacitated adults without consent,[12] the nature and limits of any such justification or justifications had not been explored in any depth by the English courts prior to *Re F*, although it had been a matter of speculation amongst lawyers and judges.[13] Nor had this aspect of the law relating to medical

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> Every former human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault...

[4] Above (n.2).

[5] A. Grubb, "Case comment: Competent patient's right to refuse life-sustaining treatment" [2002] 10 *Med L Rev* 201, 203.

treatment been explored in any detail by academic writers prior to an article in the 1974 volume of the *Law Quarterly Review* by Professor Skegg upon the subject.[14]

Similarly, so far as emergency medical treatment is concerned, it appears that it is and has always been uncontroversial that necessary treatment given to incapacitated patients in cases of medical emergency is lawful, as was recognised by Lord Donaldson, MR., in *Re F*:

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[6] A child who is 16 or over may consent to medical treatment: s.8 Family Law Reform Act 1969. A child who is under 16 may give a valid consent to medical treatment provided they are "Gillick competent": *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112; McHale and Fox, (n.1), 439-451.

[7] A child's mother has parental responsibility ("PR"). Her father will have PR if married to the mother or registered on the child's birth certificate, but may also attain PR by entering into a parental responsibility agreement with the mother, or by applying to the court for a parental responsibility order or a residence order (Children Act ("CA") 1989, ss. 4, 12(2)). Non-parents may acquire PR in a variety of ways: civil partners of a parent with PR may obtain PR by court order or agreement with those with PR ; by being appointed as a guardian (s.5(6) CA 1989); by obtaining a residence order (s.12(2) CA 1989), or by being granted an emergency protection order. A local authority can acquire PR and be able to give proxy consent to medical treatment where it obtains a care order or an emergency protection order (s.44, CA 1989). PR is defined in s. 3(1) CA 1989: "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child." Usually where more than one person has PR, each of them may act alone e.g. in consenting to medical treatment (s.2(7) CA 1989). However, the courts may in certain circumstances provide that court approval is required where those with PR disagree as to whether consent should be given to a particular medical procedure: e.g. ritual circumcision (*Re J* [2000] 1 FLR 571 (CA)) and immunisation (*Re B (Child)* [2003] EWCA Civ 1148; [2003] FCR 156).

[8] S.3(5) CA 1989 provides that a person who has care of a child "may (subject to the provisions of the Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare." It has been suggested that this might be used to authorise medical treatment (*B* v. *B* [1992] FLR 327), but in practice, the only occasion upon which it would be reasonable for such a carer to give proxy consent would be in an emergency, in which case the doctor would be entitled to treat the child without consent: I.Kennedy & A.Grubb, *Medical Law*, 3rd edn (2000) 776.

[9] E.g. *Re W (a minor)(Medical Treatment: Court's Jurisdiction)*[1993] Fam 64 (CA). For a fuller account see: J.K. Mason and G.T. Laurie, *Mason & McCall Smith's Law and Medical Ethics*, 7th edn. (2005) 353-373; 6th edn (2010) 66-86.

[10] *Ibid.*, Lord Brandon, 57-59, Lord Goff, 79.

[11] *Re F* [1990] 2 AC 1, Lord Donaldson MR, 13 (CA); Lord Bridge, 52 (HL).

[12] P.D.G. Skegg, "A Justification for Medical Procedures Performed Without Consent", (1974) 90 *LQR* 512, 512. See also: G. Williams, "Necessity" [1978] *Crim LR* 128.

[13] Lord Justice Brooke, "Patients, Doctors and the Law (1963-2003) a Few Reflections" (2004) 17 *MLJ* 72.

[14] Skegg (n.12) 512.

> It is well settled that a doctor who is faced with an unconscious patient, for example one who is admitted to the casualty department of a hospital following a road accident, is lawfully entitled and probably bound to carry out such treatment as is necessary to safeguard the life and health of that patient, notwithstanding that the patient is in no position to consent or to refuse consent. [15]

However, even in relation to emergency treatment, the basis upon which such treatment is lawful was not entirely clear prior to *Re F* and was a matter of some debate, as there had been no English case law specifically determining the issue.[16] Professor Skegg suggested that there might be a series of different, overlapping justifications with different theoretical bases which might be used to justify emergency treatment and, more generally the provision of medical treatment without consent, for example: presumed (or implied) consent, agency of necessity, necessity, duty to act and best interests.[17] There have been a number of reported cases from the United States where the lawfulness of actual or alleged emergency treatment has been considered: in a number of them it has been suggested that the treatment concerned was justified because the doctor had implied consent,[18] whilst others have

[15] [1990] 2 AC 1, 13.

[16] Skegg (n.12); *c.f.* E.I. Picard and G.B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3rd edn (1996) 51. As Skegg notes (*Ibid.*, 512), a number of jurists had expressed theoir opinion on the legal position, but they had not analysed in any depth the circumstances in which a doctor might lawfully treat a patient without consent, see *e.g*: J.F.Stephen, *Digest of the Criminal Law*, 4th edn. (1887), 148, available at: http://www.archive.org/details/digestofcriminal00stepuoft; Lord Devlin, *Samples of Lawmaking* (1962) 91-93.

[17] Skegg (n.12) 512-513. See also: P.D.G. Skegg, *Law, Ethics and Medicine: Studies in Medical Law* (1984).

[18] See *e.g. Jackovach* v *Yocom* (1931) 212 Iowa 914 (Sup Ct Iowa): 17 year old boy had shattered one arm at the elbow joint in an accident and the defendant physician, unable to obtain consent from the boy's parents, amputated the arm to save his life. The Supreme Court of Iowa upheld the finding of the trial court that the boy had impliedly consented to the amputation when he asked the doctor to 'fix' his arm. *C.f. Barnett* v. *Bachrach* (1843) 34 A.2d 626 (D.C. Court of Appeals); *Preston* v *Hubbell* (1948) 87 Cal App 2d 53: implied consent to repair jaw fracture that developed during a tooth extraction "because the common sense of the situation showed that the dentist had an immediate duty to repair it".

placed emphasis upon the duty of a doctor to act in an emergency.[19] Prosser and Keeton have suggested that the lawfulness of emergency medical treatment "is more satisfactorily explained as a privilege".[20] By contrast, a series of Canadian cases have suggested that it is necessity which justifies medical treatment "to preserve the health or life of the patient".[21]

In Chapter 5, I examined the criminal and civil case law prior to *Re F*, and suggested that: first, there was no general or clear principle of neccessity running through the common law, and second, that judicial creativity was required by Lord Goff in *Re F* in his formulation of 'common law necessity'. In this chapter, I consider the possible justifications that were arguably available to justify the treatment of incapacitated adults and critically assess their merits and demerits. The combination of the ending of the former *parens* patriae jurisdiction over incompetent adults, the failure to replace this jurisdiction by an equivalent statutory power, and

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[19] See *e.g.*: *Delahunt* v *Finton* (1928) 244 Mich 226 (Sup Ct Michigan) Potter J, 229: "It is settled that a surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands, in cases of emergency, without the consent of the patient". *C.f. Wells v McGehee* (1949) 39 So 2d 196 (Court of Appeal, Louisiana); *Sullivan* v *Montgomery* (1935) 155 Misc 448 (City Court, NY) Schackno J, 449; *Luka* v *Lowrie* (1912) 171 Mich 122 (Supreme Court of Michigan); *Pratt* v *Davis* (1906) 224 Ill 300 (Supreme Court of Illinois) Scott CJ, 309-310:

> Emergencies arise, and when a surgeon is called it is sometimes found that some action must be taken immediately for the preservation of the life or health of the patient, where it is impracticable to obtain the consent of the ailing or injured one or of anyone authorized to speak for him. In such event the surgeon may lawfully, and it his duty to, perform such operation as good surgery demands.

[20] W. Page Keeton (ed.) *Prosser and Keeton on The Law of Torts*, 5th edn (1984) 117, where it is suggested that there are three requirements for this privilege to exist:

(i) the patient must be unconscious or lack capacity to make a decision, while no one legally authorized to act as agent for the patient is available;
(ii) it must reasonably appear that delay in order to obtain consent would "subject the patient to a risk of serious bodily injury or death which prompt action would avoid, and
(iii) in the circumstances "a reasonable person would consent, and the probabilities are that the patient would consent".

[21] *Picard* (n.16) 51; *Marshall* v *Curry* [1933] 3 DLR 260; *Murray* v *McMurchy* [1949] 2 DLR 442; *Parmley* v *Parmley and Yule* [1945] 4 DLR 81. These cases are discussed above, Ch.5, 189-190.

the fact that there was no common law power to provide a proxy consent to treatment on behalf of an incapacitated adult, meant that there was a 'gap' in the law.[22] The House of Lords in *Re F* filled this gap when it revealed that the provision of medical treatment or care to incapacitated adults in their best interests was justified by the common law principle of necessity.[23]

It might be argued that, given pragmatism's emphasis upon 'what works',[24] it would have been sufficient to find any practical solution that filled the lacuna in the law. However, I suggest that it would be a rather poor form both of law-making and of pragmatism that merely 'plumped' for the first workable solution that came to mind. The pragmatic approach has been criticised, particularly by Dworkin, for adopting legal solutions out of short-term expediency rather than seeking to make decisions that respect past decisions and attempt to secure consistency with pre-existing legal principle.[25] I have suggested that a more accurate account of pragmatism may be found in Sullivan's[26] suggestion that the primary aim of the pragmatic decision maker is to ensure that their decision provides an effective solution to the problem before them. Maintaining sufficient consistency with past decisions to preserve "a sense of fairness in the application of the law",[27] so that individuals are able to predict what behaviour will be lawful, is part and parcel of this.[28] The pragmatic approach is not, as Dworkin suggests,[29] entirely disrespectful

[22] Above, 114-116.
[23] Above, 21.
[24] Above, 38.
[25] Above, 38-39. G. Dworkin, *Law's Empire* (1986),161; *C.f. Justice in Robes* (2006), 21-22.
[26] M. Sullivan, *Legal Pragmatism: Community, Rights and Democracy* (2007), 33-45.
[27] *Ibid.* 38.
[28] *Ibid.*, 38, 41. Above, 38.

of past decisions and historical context, but its focus upon finding effective solutions to problems means that past authority will be used and applied when it is of assistance, and departed from when it is not. When established law appears not to provide a satisfactory solution to a particular legal problem, common law judges do not merely create new legal principles from thin air, but "tend to proceed by analogy",[30] drawing upon decided cases so that any new formulation of doctrine may be revealed as being based on a new understanding or rationalisation of existing law, rather than pure judicial invention.[31]

As I indicated in Chapter 2, common sense, both in its ordinary[32] and in its technical[33] senses, plays an important part in this decision-making process. An outcome that is seen as being contrary to common sense is vulnerable to attack on the basis that it is not in touch with reality.[34] In extreme cases, this may even lead to ridicule of judicial rulings and the judges that made them.[35] A decision that is regarded as lacking in the sort of 'technical common sense' that judges are expected to have, namely a good undertanding and appreciation of the applicable law and principles,[36] would be likely to be subjected to criticism from fellow judges and lawyers and likely to be overturned on appeal. In *Re F*, the House of Lords was faced with finding a solution to what might be regarded as a systemic problem: how was the provision of treatment and care to incapacitated adults to be justified? One

[29] Above, 38-39; (n.23).
[30] Lord Goff of Chieveley, "The Future of the Common Law" [1997] 46 *ICLQ* 745, 753. Above, 23.
[31] Above, 24; N. MacCormick, *Legal Reasoning and Legal Theory* (1978) 126.
[32] Above, 41.
[33] Above, 55-57.
[34] Above, 61.
[35] Above, 61-62.
[36] *C.f.* Above, 57.

option, suggested by counsel for the Official Solicitor, might have been to recognise that no treatment or care could be lawfully provided to an incapacitated adult.[37] However, for the House of Lords to announce that they were unable to find a legal justification for such treatment and that it was therefore unlawful, would have been seen by many as being "startling",[38] as Lord Goff recognised:

> For centuries, treatment and care must have been given to such persons, without any suggestion that it was unlawful to do so. I find it very difficult to believe that the common law is so deficient as to be incapable of providing for so obvious a need.[39]

Such an approach might well have appeared incomprehensible to non-lawyers, as well as placing those dealing with incapacitated adults in an extremely difficult position:

> It would be intolerable for members of the medical, nursing and other professions devoted to the care of the sick that, in caring for those lacking the capacity to consent to treatment they should be put in the dilemma that, if they administer the treatment which they believe to be in the patient's best interests, acting with due skill and care, they run the risk of being held guilty of trespass to the person, but if they withhold that treatment, they may be in breach of a duty of care owed to the patient.[40]

It was therefore not suprising that this argument was given short shrift by the Law Lords: common sense dictated that the common law should be able to find a route to make such treatment and care lawful.

As I explained in Chapter 4, according to the orthodox view of the ambit of the declaratory jurisdiction, which I have suggested was accepted and followed by

[37] [1990] 2 AC 1, 72.
[38] *Ibid.*
[39] *Ibid.*
[40] [1990] 2 AC 1, Lord Bridge, 52.

the House of Lords in *re F*, a declaration is merely a legal pronouncement as to what the law is and does not alter the substantive law.[41] A declaration does not make the conduct in question lawful, it merely pronounces what the legal position is.[42] Having accepted this orthodox approach, and having taken the view that there must be a lawful basis for the treatment of incapacitated adults, the court then had to decide what that basis was. 'Common sense' considerations did not merely lead the House of Lords to decide that the treatment of incapacitated adults could be justified at common law, but also helped to steer the House of Lords in their determination of what was the most appropriate justification. I suggest that one of the most relevant considerations in relation to the latter issue was the notion that the law should be intelligible: to be capable of being understood and applied, not merely by medical practitioners, but also by those caring for incapacitated adults.[43] As Lord Bridge indicated, it was "of first importance that the common law should be readily intelligible to and applicable by all those who undertake the care of persons lacking the capacity to consent to treatment".[44] This pointed to a solution which was sufficiently broad and flexible to cover both situations of emergency and more general, long-term care, and situations where there had been no pre-existing relationship between the medical practitioner or carer and the patient. To apply different justifications depending on whether or not the situation was one of emergency would have added unwanted and unnecessary complexity to the law, particularly as:

[41] Above, 96.
[42] [1990] 2 AC 1, Lord Donaldson MR, 20; Butler-Sloss LJ, 42; Lord Brandon, 63.
[43] Above, 63. See *e.g.* Lord Reid, "The Judge as Law Maker" [1972] 12 *JSPTL* 22, 25.
[44] [1990] 2 AC 1, 52.

> ...there is a clear and logical connection between the position of an adult who through an accident is temporarily deprived of the power of consent, the emergency treatment case where consent being unobtainable is not required, and the case of an adult who through permanent disability is equally unable to consent. The difference is largely, although not entirely, one of scale.[45]

Given this need for a clear and intelligible solution, I suggest that a consideration of the available possible options leads one to the conclusion that, although judicial creativity was required to shape the defence of necessity to fill the lacuna in the law relating to the provision of treatment to incapacitated adults,[46] in the circumstances it was, both legally and practically, the most suitable option to adopt. I now turn to consider each of these options.

Lack of hostility

Picard has commented that it has been suggested in some English cases that "emergency treatment without consent is justified because it lacks the element of 'hostility' which is essential to liability in battery,[47] relying upon the case of *Wilson* v. *Pringle*,[48] where it was stated that:

> ...for there to be either an assault or a battery there must be something in the nature of hostility. It may be evinced by anger, by words or gesture. Sometimes the very act of battery will speak for itself, as where somebody uses a weapon on another.[49]

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[45] *Ibid.*, Lord Donaldson MR, 17 (CA).
[46] Above, Ch.5.
[47] (n.16), 51. The decision in *re F* is also referred to: *ibid.*, fn.70.
[48] [1987] QB 237. *C.f. R* v *Sutton* [1977] 1 WLR 1086.
[49] *Ibid.*, Croom-Johnson LJ, 250, who relied upon the earlier cases of *Tuberville* v Savage (1669) 1 Mod 3; *Williams* v *Jones* (1736) Cas. T. Hard. 298 and Cole v *Turner* (1704) 6 Mod 149, Holt CJ: "The least touching of another in anger is a battery". *C.f.* Blackstone, who wrote in his commentaries that:

If this were to be correct, then it might be argued that the provision of medical treatment even in the absence of consent would not amount to a battery, on the basis that such conduct was not hostile.[50] However, in the earlier case of *Faulkner* v. *Talbot*,[51] Lord Lane CJ had made it clear that hostility was not a prerequisite for there to be an assault:

> An assault[52] is any intentional touching of another person without the consent of that person and without lawful excuse. It need not necessarily be hostile or rude or aggressive, as some of the cases seem to indicate.[53]

An approach which was applied in the case of *Thomas*,[54]and followed by Goff LJ in *Collins* v. *Wilcock*, who took the view that the law protected individuals not merely against violence, "but against any form of physical molestation", a broad interpretation, subject to exceptions for "physical contact which is generally acceptable in the ordinary conduct of daily life."[55] This approach was preferred to that of the Court of Appeal in *Wilson* v. *Pringle* by Wood J in *T* v. *T*,[56] who concluded that the termination of pregnancy and sterilisation operation upon an incapacitated adult woman would be "*prima facie* acts of trespass",[57] if conducted

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> ...the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.

(*Commentaries*, vol. III,120: cited in *Collins* v *Wilcock* (1984) 79 Cr App R 229, Goff LJ, 234).

[50] In *T* v *T* [1988] Fam 52, 67, Wood J accepted that: "The incision made by the surgeon's scalpel need not be and probably is most unlikely to be hostile...".

[51] [1981] 1 WLR 1528.

[52] In this instance meaning a battery: D. Ormerod, *Smith and Hogan Criminal Law*, 13th edn. (2011), 619.

[53](n.51), 1534.

[54] (1985) 81 Cr App R 331, Ackner LJ, 334.

[55] (n.49), 234. In *Wainwright* v *Home Office* [2003] UKHL 53, [2004] 2 AC 406, Lord Hoffman (at 417) suggested that Goff LJ had, in this passage, redefined the concept of hostile intent.

[56] [1988] Fam 52.

[57] *Ibid*., 67.

without consent. Given these authorities, the significance which the courts have accorded to the principle of self determination in relation to competent adults, and the fact that "offences against the person protect the individual's personal autonomy by providing at least the opportunity for criminal punishment for the slightest unjustified infringement",[58] it is unsurprising that, in *Re F*,[59] Lord Goff confirmed his view that hostility was not required for an assault or battery to be committed:

> A prank that gets out of hand; an over-friendly slap on the back; surgical treatment by a surgeon who mistakenly thinks that the patient has consented to it - all these things may transcend the bounds of lawfulness, without being characterised as hostile. Indeed the suggested qualification is difficult to reconcile with the principle that any touching of another's body is, in the absence of lawful excuse, capable of amounting to a battery and a trespass. Furthermore, in the case of medical treatment, we have to bear well in mind the libertarian principle of self-determination...[60]

By contrast, the majority of House of Lords in *R* v. *Brown*[61] subsequently appeared to suggest that hostility was required for there to be a battery. That case involved sado-masochistic acts performed between consenting adult males for their mutual enjoyment, and the appellants had all been convicted of offences under sections 47 and 20 of the Offences against the Person Act 1861. It was argued that hostility was an essential element of the offences charged and that this was absent on the facts of the case, since the parties had consented. Lord Jauncey stated that: "If the appellant's activities in relation to the receivers were unlawful they were also hostile and a necessary ingredient of assault was present".[62] However, this appears to suggest that the activity was hostile because it was unlawful. As Ormerod has

[58] Ormerod, (n.52).
[59] [1990] 2 AC 1
[60] *Ibid.*, Lord Goff, 74. *C.f.* Lord Brandon, 55; Lord Griffiths, 70.
[61] [1994] 1 AC 212.
[62] *Ibid.*, 244. Lord Lowry agreed with this view (254).

observed, since the acts were only unlawful if they were assaults, this reasoning is both circular and flawed, and it may be argued that the decision in fact confirms that hostility is not an element of the offence of battery.[63] In any event, the majority approach in *Brown* has not been followed in subsequent cases, nor has it been argued that such an approach should be followed in relation to medical treatment provided without consent.

Implied, inferred or presumed consent

A potentially plausible option would have been to expand the notion of consent in order to justify treatment in such cases, for example, by implying, inferring or presuming consent. This was recognised by Wood J. in *T* v. *T*:[64]

> The first possible approach is to say that in some, if not many cases, there would be an implied consent by the patient to the carrying out of those procedures which the surgeon, without negligence, considers necessary or desirable in the interests of his patient's health.

It is clear that consent might be implied or inferred "where circumstances dictate that it is clearly indicated and it is manifest that the will of the patient accompanies such consent".[65] An example of this may be found in the case of *O'Brien* v. *Cunard Steamship Company*,[66] where the plaintiff brought an action against a surgeon who had vaccinated her against smallpox whilst she was on board a steamship bound for Boston. The plaintiff had lined up with female passangers who were being examined

[63] (n.52) 619-620. *C.f.* A.P. Simester, G.R. Sullivan and G.R. Virgo, *Criminal Law: Theory and Doctrine*, 4th edn. (2010), 434-435.
[64] (n.56), 62.
[65] *Schweizer* v *Central Hospital* (1974) 53 DLR (3d) 494, Thompson J, 508. *C.f.* C. Sappideen and P. Vines, *Fleming's The Law of Torts*, 10th edn. (2011), 90.
[66] (1891) 154 Mass 272.

by a surgeon, and vaccinated if necessary. When it came to her turn, she held out her arm, and expressed no dissent to the vaccination taking place. It was held that her consent could be implied "whatever her unexpressed feelings may have been".[67] Kennedy and Grubb have observed that this form of implied consent may be analysed as establishing "a form of estoppel", which prevents a patient from asserting that he did not in fact consent:[68]

> It could be said that a patient will be estopped from denying that he consented to a procedure in circumstances in which a reasonable person looking at the situation would reach the conclusion that consent had been given in the light of all the circumstances.[69]

According to this analysis, which has not been mapped out in the cases, the patient's behaviour in the light of the information available to him or her assumes central importance, and Kennedy and Grubb have suggested that it may be essential to establish that the patient has "constructive knowledge of what may happen".[70] It is, however, difficult to see how this formulation of implied consent could justifiably be extended to permanently incapacitated adults who have never been able to provide a valid consent, since one would be unable to conclude from the circumstances that consent had in fact been given, and it would be counterintuitive and contrary to common sense to impute "constructive knowledge" in a case where knowledge and understanding were evidently absent.

It has been suggested in a number of North American cases that implied consent might be extended so far as to justify treatment in emergency cases in which

[67] *Ibid*., Knowlton J, 273.
[68] Kennedy and Grubb (n.8), 589. *C.f.* Jackson, (n.1), 219,
[69] *Ibid.*, 591.
[70] *Ibid.*

a patient was unconscious and unable to consent to necessary treatment, on the premise that, since the treatment is in the patient's best interests, she would consent to it if she were conscious.[71] In *Mohr* v. *Williams*[72] Judge Brown explained the position as follows:

> If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent of the injured person would be implied.[73]

A further suggested alternative would be to presume consent in such a scenario.[74]

There are a number of objections to the use of implied and presumed consent to provide a lawful basis to treat incapacitated individuals. First, to rely upon implied or presumed consent where the patient is in fact incapable of consenting is to rely upon a fictitious concept of consent because the patient does not, in fact, consent.[75] As Skegg has observed: "Fictions can play an invaluable part in the development of the law, but they are best avoided where a direct statement of the law is possible".[76] Law based upon the assumption of fictions may be practically useful to deal with specific legal difficulties, but it is vulnerable to attack precisely

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[71] *Jackovach* v *Yocom*; *Barnett* v *Bacharch*; *Preston* v *Hubbell* (n.18).
[72] (1905) 104 NW 12.
[73] *Ibid.*, 18. The judge also went on to extend the principle to cases where, during the course of an operation to which the patient had consented, the doctor discovered "conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient", suggesting that in such circumstances the doctor would be "justified in extending the operation to remove and overcome them". The plaintiff has consented to an operation on her right ear, but during the operation the surgeon decided that her left ear was in a more serious condition and operated upon that. It was held that the plaintiff had not expressly or impliedly consented to the surgery (at 19). *C.f. Murray v McMurchy* [1949] 2 DLR 442; *Parmley v Parmley and Yule* [1945] 4 DLR 81.
[74] G.E.W. Wolstenholme and M.O'Connor (eds.), *Ethics in Medical Progress* (1966), Lord Kilbrandon, 3, available at: http://onlinelibrary.wiley.com/book/10.1002/9780470719480 .
[75] Skegg, (n.12), 512-3.
[76] *Ibid.*, 513. *C.f. Marshall* v *Curry* [1933] 3 DLR 260, Chisholm CJ, 275.

upon the basis that it is artificial and does not represent the true factual position. The use of such a legal fiction becomes increasing less justifiable and credible as the length and extent of the patient's incapacity increases. It is one thing to use implied consent to justify emergency treatment in respect of a normally capacitous patient, on the basis that "the common sense of the situation"[77] indicates that the treatment is immediately required and the patient would have consented if she were in her normal, conscious state. However, in cases where a patient has been incapacitated from birth, the "notion of implying consent when the patient never had, nor will have, capacity to consent"[78] may be seen as being an exercise in mental gymnastics: at best "artificial"[79] or "difficult"[80] and at worst legerdemain or an exercise in legal dishonesty. The use of a doctrine of implied consent to provide the lawful basis for treatment and care provided to incapacitated adults in such circumstances is unattractive because it departs from common sense views as to what consent entails. The 'man on the Clapham omnibus' might well conclude that a law that implied consent where there was no prospect of actual consent ever being obtained, had lost touch with reality.[81]

Second, there are significant doctrinal reasons for not generally extending implied consent as a justification for medical treatment where the patient is unable to

[77] *Preston* v *Hubbell* (1948) 87 Cal App 2d 53.
[78] I. Kennedy and A. Grubb (n.8), 591. This was the reason for Wood J rejecting implied consent as an approach in *T* v *T* (n.56), 62.
[79] *Re F*, Lord Goff, 72.
[80] *Ibid.*
[81] *C.f.* E.W. Thomas, *The Judicial Process* (2005) 337.

consent. In *Collins* v. *Willcock*,[82] Goff LJ considered the justification of implied consent when he stated that:

> …a broader exception has been created to allow for the exigencies of everyday life. Generally speaking consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is, within reason, slapped…Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life.[83]

This exception, to take account of the "exigencies"[84] or "vicissitudes"[85] of everyday life was considered in *Wilson* v. *Pringle*[86] to provide:

> …a solution to the old problem of what legal rule allows a casualty surgeon to perform an urgent operation on an unconscious patient who is brought into hospital. The patient cannot consent, and there may be no next-of-kin available to do it for him.[87] Hitherto it has been customary to say in such cases that consent is to be implied for what would otherwise be a battery on the unconscious body. It is better simply to say that the surgeon's action is acceptable in the ordinary conduct of everyday life, and not a battery.[88]

Both Goff LJ in *Collins* v. *Willcock* and Croom-Johnson LJ in *Wilson* v. *Pringle* preferred to see the exception as one embracing conduct which could be regarded as being acceptable in the ordinary conduct of daily life, rather than relying upon the

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[82] [1984] 1 WLR 1172.
[83] *Ibid*., 1177.
[84] *Ibid.*
[85] *Re F* [1990] 2 AC 1, Lord Donaldson MR, 9-10.
[86] [1987] QB 237.
[87] Croom-Johnson LJ here appears to be under the commonly held misconception that next-of-kin can give proxy consent for their unconscious adult relative. Such consent is not legally valid: *Re F*, Lord Goff, 71-2; M. Brazier and E. Cave, *Medicine, Patients and the Law*, 5th edn. (2011), 142. *C.f. In re Application of Long Island Jewish-Hillside Medical Center* (1973) 73 Misc.2d 395; *Pratt* v *Davis* (1906) 224 Ill 300.
[88] [1987] QB 237, Croom-Johnson LJ, 252.

concept of implied consent.[89] However, whilst it is relatively straightforward to regard jostling, touching someone to gain his or her attention,[90] and other minor conduct as falling within this exception, the inclusion of surgery and invasive medical treatment within this exception is much more difficult. This was recognised by Wood J in *T* v. *T* when he stated that:

> It would not seem to me that operative treatments or perhaps in some more serious cases medical treatments in hospital fall within the phrases 'exigencies of everyday life' or 'the ordinary conduct of daily life.'[91]

And by Lord Goff in *Re F*, when he rejected the approach adopted in *Wilson* v. *Pringle*:

> That exception is concerned with the ordinary events of everyday life- jostling in public places and such like- and affects all persons, whether or not they are capable of giving their consent. Medical treatment- even treatment for minor ailments- does not fall within that category of events. The general rule is that consent is necessary to render such treatment lawful. If such treatment administered without consent is not to be unlawful, it has to be justified upon some other principle.[92]

As Lord Donaldson MR observed in *Re F*: "If these were all incidents of everyday life, that life would be tumultuous indeed".[93] Lord Goff's approach may be seen as seeking to bring the law into line with common sense expectations of the 'ordinary' narrative of 'normal' life. Whilst we may expect to experience a certain amount of pushing or shoving when we travel on public transport or make our way through

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[89] Ormerod (n.52) 628. *C.f.* W. Wilson, *Criminal Law: Doctrine and Theory*, 4th edn. (2011) 296.
[90] *Wiffin* v *Kincard* (1807) Bos & PNR 471, 127 ER 713; *Coward* v *Baddeley* (1859) 4 Hurl & N 478, 157 ER 927; *Mepstead* v *DPP* [1996] *Crim LR* 111.
[91] (n.56), 65.
[92] [1990] 2 AC 1, 73.
[93] *Ibid.*, 16. *C.f.* Lord Donaldson, 31, where he rejects implied consent as the explanation for the immunity of doctors who provide emergency treatment and reserved this exception for: "…the commonplace events of daily life…I would not seek to extend it to cover surgical procedures which may include amputations."

crowded public places, medical treatment is seen as being an interruption of everyday routine.[94]

A further difficulty with relying upon implied consent to justify emergency or other medical treatment without consent is that, as we have seen, implied consent is a concept which has already been recognised in medical law in relation to situations where the patient has indicated her consent by conduct, rather than by words.[95] An example of this may be found in the case of *O'Brien* v. *Cunard SS Co*,[96] discussed above.[97] To extend the doctrine to cover cases in which the basis upon which consent is being implied bears no resemblance to any act of the patient would be considerably to extend it and to cut it adrift from its current basis. If this course were to be adopted, it may be argued that there is scope for confusion as to whether and to what extent any previous relationship between doctor and patient is relevant.[98] For example: "there might be room for an argument that there was some duty to look at earlier medical records to discover the plaintiff's attitude when conscious to particular forms of treatment."[99] Where there has been a pre-existing relationship between the doctor and patient, arguments may arise as to the extent to which the patient might have been expected to endorse the medical treatment provided.[100]

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[94] *C.f.* G. Canguilhem, *The Normal and the Pathological* (1991)
[95] Skegg, (n.12), 513; McHale and M. Fox, (n.1)., 360.
[96] (1891) 28 NE 266.
[97] Above, 225-226.
[98] Skegg, (n.12), 513; *C.f. Re Rhodes, Rhodes* v *Rhodes* (1890) 44 Ch. D. 94, where a similar criticism was made of the term "implied consent".
[99] *Re F* [1990] 2 AC 1, Neill LJ, 30.
[100] See *e.g.* the case of a consultant anaesthetist who, following an operation to extract four teeth under general anaesthetic and whilst the patient was still unconscious, inserted a diclofenac suppository to provide pain relief following the surgery. The patient had signed a general consent form, but had not signed a consent form which specifically related to anaesthesia and there had been

Given that it is desirable that "the immunity of the casualty officer from actions other than actions for negligence should be clear and unambiguous",[101] this further points towards implied consent not providing a clear or satisfactory solution.

Other approaches

It has been suggested that agency of necessity or a similar approach "whereby the doctor would be constituted the representative of the patient"[102] might be used to justify treatment performed without consent in the best interests of the patient. The doctrine relating to agency of necessity is discussed in more detail in Chapter 5 above.[103] An analogy may be drawn between the position of a doctor treating an incapacitated patient and that of an 'agent of necessity', who in a situation which is "so pressing as to compel intervention",[104] acts without authority in the best interests of his principal. However, as Skegg has observed, the main objection to be made against both of these proposed justifications is that since, in both cases they seek to construct a legal relationship of or akin to agency between the parties, they may be seen as being an unsatisfactory solution in cases in which there is no previous relationship between the doctor and patient.[105] In such a case, in common with the concepts of implied or presumed consent, these justifications may also be attacked

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no discussion about pain relief. The GMC found that the anaesthetist had assaulted the patient and found him guilty of serious professional misconduct: J. Mitchell "ABC of Breast Diseases: A fundamental problem of consent" (1995) 310 *BMJ* 43-46; M.A. Jones, "Commentary: The Legal Position" (1995) 310 *BMJ* 46-47.

[101] (n.99).

[102] Skegg (n.12) 513.

[103] Above, 209-211.

[104] *Surrey Breakdown Ltd.* v *Knight* [1999] RTR 84,88.

[105] *C.f. Re F* [1990] 2 AC 1, Neill J, 30 (CA).

as being based to a greater or lesser extent upon a legal fiction.[106]

A further possible approach would have been to use a justification based upon the doctor's duty to act in the best interests of her patient, or upon the public interest in the patient receiving treatment. The difficulty with relying upon the doctor's duty alone to provide justification for the treatment of incapacitated adults is that we do not generally regard the doctor's duty to treat the patient as providing a complete answer to the issue of whether the treatment was lawful. Certainly, as we have seen, it is clear law that it does not in relation to competent adults.[107] The doctor's duty to act in the best interests of her patient is qualified by the long-established legal principle that:

> ...the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so...[108]

Focusing upon the duty owed by a doctor to his patient would not provide an answer to the question of whether the treatment was lawful, for, as Skegg has observed:

> ...this approach would still beg the most important question, for the fact that a doctor has a duty towards a particular patient will not necessarily empower him to proceed without consent. The courts would still have to decide when a doctor was empowered to do so.[109]

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[106] Skegg (n.12), 513.
[107] Above, 209-211. See *e.g. B* v *NHS Trust* [2002] EWHC 429 (Fam), [2002] 1 FLR 1090.
[108] *Bland* [1993] AC 789, Lord Goff, 864. See also: *W* v *W, Sidaway*, and *Schloendorff* (n.3).
[109] *Ibid.* See also: Skegg (1984), (n.17), 114-115; Kennedy & Grubb (n.8), 866. *C.f. Leigh* v *Gladstone* (1909) 26 TLR 129.

The problem with relying upon the duty owed by a doctor to her patient to justify treatment without consent, is that it may be regarded as providing a justification which is both too broad and too narrow. A justification based upon a doctor's duty to her patient might be seen as being too broad because it could potentially be used to interfere with a competent adult patient's right of self-determination:

> If, from the fact that a doctor had a duty of care to a patient, it followed that he was entitled to administer necessary treatment without consent, the right to refuse treatment would be severely curtailed.[110]

It may also be seen as being too narrow, because there might be difficulties in applying a justification based upon duty to cases in which there was no such duty. In *re F*, Lord Goff recognised that there might be be cases in which incapacitated adults needed to be treated in circumstances in which the treatment could not be justified by a pre-existing duty of care:

> ...the lawfulness of the doctor's action is, at least in its origin, to be found in the principle of necessity. This can perhaps be seen most clearly in cases where there is no continuing relationship between doctor and patient. The 'doctor in the house' who volunteers to assist a lady in the audience who, overcome by the drama or by the heat in the theatre, has fainted away, is impelled to act by no greater duty than that imposed by his own Hippocratic oath. Furthermore, intervention can be justified in the case of a non-professional, as well as a professional, man or woman who has no pre-existing relationship with the assisting person – as in the case of a stranger who rushes to assist an injured man after an accident.[111]

Nor does the fact that treatment is provided in the patient's best interests necessarily make the treatment lawful: there is both English and North American authority to support the assertion made by Skegg that: "the mere fact that a

[110] Skegg (1984), (n.17), 115.
[111] [1990] 2 AC 1, 77-78. *C.f.* Kennedy & Grubb (n.8) 866.

procedure is performed for the patient's benefit will not of itself justify a doctor in proceeding without consent".[112] In *Cull* v. *Royal Surrey County Hospital,*[113] the patient, who suffered from epilepsy, was admitted to the defendant hospital to undergo an abortion on medical grounds. She was advised to have a hysterectomy, but declined to consent to that operation. However, the surgeon performed a hysterectomy, on the basis that it was in the patient's best interests not to have a further pregnancy. In summing up the case to the jury, the Lord Chief Justice commented that the surgeon's conduct "was a case for congratulation rather than damages",[114] but nevertheless went on to direct the jury that: "In this country, a point had not been reached at which a surgeon considering that sterilization was advisable in a particular case could proceed to carry it out against the desire of the patient".[115] In a similar vein, in the case of *Devi* v. *West Midlands Regional Health Authority,*[116] the patient had, some months after the birth of a child, undergone on medical advice a dilation and curettage operation to remove matter retained in the uterus following the birth. During the procedure, it became apparent that the uterus had been perforated. The doctor decided that it would be in the best interests of the patient to

[112] Skegg, (1984), (n.17), 100. See *e.g. Devi* v *West Midlands RHA* [1980] CLY 687 (Kilner Brown J), 1977 D 5681 (CA) (Lexis Transcript); *Cull* v *Royal Surrey County Hospital* [1932] 1 *BMJ* 1195; *B* v *NHS Hospital Trust* [2002] EWHC 429 (Fam), [2002] 1 FLR 1090; *Boase* v *Paul* [1931] 4 DLR 435; *Parmley* v *Parmley and Yule* [1945] 4 DLR 81; *Malette* v *Shulman* (1990) 67 DLR (4th) 321. Nor is a doctor obliged in law to provide whatever treatment believes is necessary if the doctor's professional opinion is that the treatment is not in the patient's best interests: see *e.g. Re J (A Minor)(Wardship: Medical Treatment)* [1991] Fam 33; *Re J (A Minor)(Child in Care: Medical Treatment)* [1993] Fam 15; *R (Burke)* v *GMC* [2005] EWCA Civ 1003, [2006] QB 273, Lord Phillips MR, [30].

[113] [1932] 1 *BMJ* 1195.

[114] *Ibid.*, 1196.

[115] *Ibid.* The Plaintiff's claims in negligence and trespass succeeded. *C.f. Mulloy* v *Hop Sang* [1935] 1 WWR 714 (Alta CA): Necessary amputation nevertheless a battery in the absence of the patient's consent.

[116] [1980] CLY 687 (Kilner Brown J), 1977 D 5681 (CA) (Transcript). *C.f.* M. Brazier, "Competence, Consent and Proxy Consents", in M. Brazier and M. Lobjoit (eds.), *Protecting the Vulnerable: Autonomy and Consent in Health Care* (1991) 34, 34-35.

be sterilised in case the uterus ruptured during a future pregnancy, and performed a sterilisation operation without consent. The Health Authority accepted that this procedure amounted to an assault.[117]

Similar criticisms may also be made with regard to using public interest or the fact that the doctor is acting in the best interests of the patient as a justification for treatment: that neither in themselves on their own justify treating a patient without consent. There are a number of areas in which it might be argued that there is a strong public interest in patients receiving treatment: for example, in relation to immunisation against certain infectious or contagious diseases, or possibly in relation to the provision of contraception, yet is not suggested that that would entitle medical practitioners to provide such treatment in the absence of consent or statutory or other justification.[118] Certainly, in *Re F* Lord Brandon clearly indicated that, although the public interest was key, it did not on its own, make the treatment lawful:

> The Court of Appeal in the present case regarded the matter as depending on the public interest. I would not disagree with that as a broad proposition, but I

[117] *Ibid.* Mrs. Devi received £4,000 damages. *C.f. B* v *NHS Hospital Trust* [2002] EWHC 429 (Fam); [2002] 1 FLR 1090: Mrs B was paralysed from the neck down and wished life sustaining treatment to be stopped, so that she could die, but doctors treating her refused to switch off her ventilator. Dame Elizabeth Butler-Sloss P held that she had capacity to refuse further treatment and that that decision should be respected. She held that the refusal to discontinue treatment in the face of Mrs B's competent refusal amounted to an assault and made a small award of damages. See *e.g.* S. Michalowski, "Trial and error at the end of life: no harm done?" (2007) 27 *OJLS 257. C.f. Nancy B* v *Hotel-Dieu de Quebec* (1992) 86 DLR (4th) 385.

[118] See *e.g.* Public Health (Control of Diseases) Act 1984, amended by Health and Social Care Act 2008. *C.f. Gillick* [1986] AC 112; *O'Brien* v. *Cunard SS* (1891) 154 Mass 272 and the position in relation to intimate examinations: Fox and McHale (n.1) 366-367; S. Bewley, "The Law, Medical Students and Consent" (1992) 304 *BMJ* 1551. Public interest is neverthless a key factor, even where the patient does consent, since consent does not provide a complete answer to the lawfulness of medical treatment: see *e.g.* Jackson, (n.1), 217-219; T. Elliott, "Body Dysmorphic Diorder, Radical Surgery and the Limits of Consent" [2009] 17 *Med L Rev*149, 172-174.

> think that it is helpful to consider the principle in accordance with which the public interest leads to this result.[119]

Necessity

In the previous chapter I reviewed the criminal and civil cases in which necessity had been argued as a defence prior to *re F* and suggested that the principle was by no means as clear or as coherent as had been suggested by Lord Goff in *Re F*.[120] Although the scope of the defence was not entirely clear and its application had been severely limited by the courts, it was at least an established common law defence and could be regarded as being broad enough to hold out "greater promise of leading to a comprehensive justification".[121] This was a significant point in favour of the use of necessity, since what was required was a justification sufficiently broad to deal with the systemic problem caused by the ending of the *parens patriae* jurisdiction in respect of incapacitated adults. Skegg saw there as being two problems with the defence: the first being in relation to the choice between values which the defence involves. This aspect was considered in the previous chapter,[122] and it is accepted that it can be an area of difficulty, particular when one has to choose between values of different orders (for example, life against property). The second was that the justification "is necessarily couched in broad and vague terms,

[119] [1990] 2 AC 1, 55.
[120] *Ibid.*, 74-76
[121] Skegg (n.12) 513.
[122] Ch. 5, 164-166.

and is therefore of little assistance in resolving specific problems".[123] This was the reason given by Wood J In *T* v. *T*[124] for rejecting the defence:

> I do not find the use of that word to be sufficiently precise as a test of what the courts would consider to be a justification for the operative procedures anticipated in the present case.[125]

However, the vagueness of the justification of necessity was, I suggest, also a significant factor in its favour, particularly to a pragmatic judge who was seeking a general, flexible and, above all, usable doctrine. The vagueness of necessity as a justification can be regarded as being one of the principle advantages of the common law justification of necessity because it leaves scope for change and development, so that the defence is flexible and may be adapted to 'fit' difficult or hitherto unforeseen situations, allowing doctors to provide treatment which would otherwise be unlawful.[126]

Conclusion

Prior to *Re F*, the legal basis for the provision of treatment without consent was unclear: there were a number of options which a court might have taken. None of these options were perfect: some could be rejected for doctrinal reasons, such as the argument that medical treatment does not involve 'hostility' and is therefore not unlawful; some might be criticised as involving the use of legal 'fictions' (for

[123] Skegg (n.12) 513-514.
[124] [1988] Fam 52
[125] *Ibid.*, 62.
[126] Cf: *Re A (Conjoined Twins: surgical separation)* [2000] 4 All ER 961; *Simms v. Simms* [2003] 1 All ER 593.

example, implied consent), or being difficult to apply in the absence of any pre-existing relationship between the parties (agency of necessity), whilst some might be criticised on the basis that it is controversial as to whether they are capable of providing an entire justification for such treatment (duty, public interest). The justification of necessity may properly be criticised for being vague and involving difficult choices, but it could be seen as having its roots in an established defence and its very vagueness may also be seen as a strength, allowing common law judges to shape it to provide a solution. It also had significant practical advantages over the other available options, since the concept of 'necessity' might be regarded as being reasonable comprehensible to non-lawyers, and it was not dependant upon strained legal fictions, which might be seen as departing from common sense views in relation to matters such as consent and agency. In the circumstances, it is suggested that a strong case may be made for it being not merely a suitable solution, but also the most apt justification, both as a matter of law and as a matter of common sense.

PART IV

Common Law Necessity Following Re F

Chapter 7

Necessity or Pragmatism?

Introduction

The House of Lords in *re F* may have found a solution to the legal problem of what the legal basis was for the treatment of incapacitated adults, but a number of legal problems remained. Some of these difficulties arose out of the formulation of the justification of necessity by the House of Lords, whilst others have arisen as the justification has been used and developed by the courts. Lord Brooke appears to have highlighted the essential reason for these difficulties when he commented that: "The Law Lords had invented a solution to fill up a gap in the law. But when Law Lords do this kind of thing they leave a lot of rough edges around".[1]

Re F and 'common law necessity'

As I indicated in Part III, Lord Goff provided the most detailed exposition of the doctrine relating to the justification of necessity applied in *F*'s case. He indicated that, to fall within the principle of necessity, the following basic requirements had to be met:

> ...not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted person, but also (2) the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person.[2]

[1] Rt. Hon. Lord Justice Brooke, "Patients, Doctors and the Law (1963-2003): a few reflections", (2004) 17 *MLJ* 72.
[2] [1990] 2 AC 1, 75.

So far as the requirement of necessity was concerned, Lord Goff made it clear that, in his view, that was what justified the provision of treatment: "the lawfulness of the doctor's action is, at least in its origins, to be found in the principle of necessity".[3] This principle of necessity was not confined to 'one off' emergency situations: "The principle is one of necessity, not of emergency."[4] However, although the justification for the treatment was necessity, the "overriding consideration"[5] for those providing medical care to incapacitated adults was that: "they should act in the best interests of the person who suffers from the misfortune of being prevented by incapacity from deciding for himself what should be done to his own body, in his own best interests."[6] Having stated that: the action taken in the patients best interests "must be such as a reasonable person would in all the circumstances take",[7] he further indicated that:

> I have said that the doctor has to act in the best interests of the assisted person...the doctor must act in accordance with a responsible and competent body of relevant professional opinion, on the principles set down in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582.[8]

Lord Brandon also apparently regarded the treatment as being justified by necessity:

> ...the principle is that, when persons lack the capacity, for whatever reason, to take decisions about the performance of operations on them, or the giving of other medical treatment to them, it is necessary that some other person or persons, with the appropriate qualifications, should take such decisions for them.[9]

And similarly regarded the best interests of the patient as being key: "The substantive law is that a proposed operation is lawful if it is in the best interests of the patient, and

[3] *Ibid.* 77. And at 78: "it is necessity itself which provides the justification for the intervention".
[4] *Ibid.*, 75.
[5] *Ibid.*, 78.
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] [1990] 2 AC 1, 55

unlawful if it is not."[10] He also agreed with Lord Goff as to the test to be applied when medical practitioners were deciding whether to treat incapacitated adults:

> If doctors were to be required, in deciding whether an operation or other treatment was in the best interests of adults incompetent to give consent, to apply some test more stringent than the *Bolam* test, the result would be that such adults would, in some circumstances at least, be deprived of the benefit of medical treatment which adults competent to give consent would enjoy. In my opinion it would be wrong for the law, in its concern to protect such adults, to produce such a result.[11]

Initial difficulties: the role of the *Bolam* test

The *Bolam* test is a test which has long been employed in the law of negligence to ascertain whether a doctor has been negligent:

> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. [12]

The House of Lords' adoption of the *Bolam* test in this context appears to have been motivated by concern that an over-rigid test might mean that unconscious or incompetent patients might not receive beneficial treatment which they required.[13] However, it attracted criticism, upon the basis that: first, it appeared that treatment which satisfied the

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[10] *Ibid.*, 64.
[11] *Ibid.*, 68. *C.f.* Lord Bridge, 52.
[12] [1957] 1 WLR 582, McNair J, 586. The test has subsequently been approved by the HL in *Whitehouse v. Jordan* [1981] 1 WLR 246 and *Maynard v. West Midlands RHA* [1984] 1 WLR 635. It was reconsidered by the HL in *Bolitho v. City and Hackney Health Authority* [1998] AC 232, where it was held that a doctor may be liable for negligence and treatment despite a body of professional opinion sanctioning his conduct, if it cannot be demonstrated to the satisfaction of a judge that the body of opinion was reliable or reasonable. See *e.g.* H. Teff, "The Standard of Care in Medical Negligence – Moving on from Bolam?" (1998) 18 *OJLS* 473; A. Samanta, M.M. Mello, C. Foster, J. Tingle and J. Samanta, "The Role of Clinical Guidelines in Medical Negligence Litigation: A Shift from the Bolam Standard" (2006) 14 *Med L Rev* 321; M. Brazier and J. Miola, "Bye-Bye Bolam: A Medical Litigation Revolution? (2000) 8 *Med L Rev* 85.
[13] [1990] 2 AC 1, per Lord Griffiths, 52; Lord Brandon , 68-69; Lord Giffiths, 69; Lord Goff , 78; Lord Jauncey, 83:"The law must not convert incompetents into second class citizens for the purposes of health care". The Court of Appeal would have imposed a more stringent version of the test: Neill LJ, 32; approved by Butler Sloss LJ, 42. *C.f.* Lord Donaldson MR, 19.

Bolam test was in the patient's best interests, so that the "best interests" test effectively became a "best medical interests" test,[14] and second, that in any event the test was insufficiently stringent to protect the rights of incapacitated patients. Jones, in particular, was critical of this apparent application of the *Bolam* test to the determination of best interests upon the basis that there might, in any one case, be several opinions as to which course of medical treatment was in the best interests of the patient, each of which was supported by a "responsible body of relevant medical opinion". [15] In such a situation, any one of these options would apparently satisfy the "*Bolam* best interests" test and would be accepted by the court.[16] This, he suggested, would lead to doctors in such cases effectively being able to choose from a range of opinions, knowing that "*none* of these competing "responsible bodies of medical opinion" can be challenged in the courts",[17] and would leave "decisions about medical treatment, even controversial treatment, within the discretion of the medical profession".[18] A possible result of this might be that courts, when deciding whether to grant a declaration that treatment is lawful, favour radical, permanent treatment over less invasive temporary procedures, overlooking the guiding

[14] G. Richardson, "Reforming Mental Health Laws: Principle or Pragmatism?" (2001) *CLP* 415, 428.
[15] M. A. Jones, "Justifying medical treatment without consent" (1989) 5 *PN* 178.
[16] Wall J fell into the error of failing properly to decide between treatment options at first instance in *Re SL (Adult Patient)(Medical Treatment)* [2000] 2 FLR 389, a case involving a 29 year-old woman with severe learning difficulties who was distressed by her periods and had a phobia about hospitals. SL's mother had applied for a declaration that it would be lawful to perform an hysterectomy or sterilisation operstion upon SL and wanting this course to be taken, but the weight of the medical evidence of the evidence favoured the less radical option of the insertion of a Mirena coil. Wall LJ declared that the hysterectomy might lawfully be performed on the patient, but then left it to the patient's mother to discuss with the doctors which method to adopt. This was set aside by the CA, who held that, since the weight of medical evidence supported the less invasive procedure, at least in the first instance, a declaration would be made allowing the patient to be fitted with the Mirena coil. *C.f. Re Z (Medical treatment: hysterectomy)* [2000] 1 FCR 274.
[17] Jones, (n.15), describes this as "Medical opinion run amok". Fennell has also criticised *Re F* as being "imbued with paternalist ideals" in "Inscribing Paternalism in the Law: Consent to Treatment and Mental Disorder" (1990) 17 *Journal of Law and Society* 29, 30.
[18] M.A. Jones, "Detaining Adults Who Lack Capacity" (2007) 23 *PN* 238. 239.

principle that the least restrictive effective treatment option ought to be chosen.[19] The case of *Re W (Mental Patient) (Sterilisation)*[20] may be seen as providing support for this concern, since in this case, Hollis J. was prepared to declare that the sterilisation of a 20 year-old woman with learning difficulties and health problems, upon the basis that: "there is clearly a responsible body of medical opinion skilled in the particular field of diagnosis and treatment in favour of sterilisation".[21] The judge reached this conclusion even though W was not sexually active, was well supervised so that there was only a small chance of her becoming pregnant, and there was evidence that a coil would provide a suitable and less intrusive method of contraception for five years or so.[22]

As Kennedy has observed, the adoption of such a *Bolam*-based best medical interests approach appears to limit the court's involvement in decisions relating to incapacitated adults.[23] If the determinative factor is whether a responsible body of medical opinion sees a proposed medical treatment as being in the patient's best interests, then the court's role may be seen as being "merely symbolic",[24] that of approving medical opinion rather than casting a critical eye over whether the proposed treatment is in the patient's global best interests.[25] Teff also criticised this apparent link between the

[19] See *e.g* BMA, *Medical Ethics Today*, 2nd edn (2003), 100-101; *Re GF (Medical Treatment) (orse F* v. *F)* [1992] 1 FLR 293. Wall J.
[20] [1993] 2 FCR 187. *C.f. Re S (Adult Patient)(Medical Treatment)* [2000] 2 FLR 389. The case may be compared with that of *Re LC (Medical Treatment: Sterilisation)* [1997] 2 FLR 258, where it was held that the care of the incapacitated woman was such that it was not in her best interests to impose on her a surgical procedure that was not without risks or consequences.
[21] *Ibid.*, 192.
[22] *Ibid.*, 190.
[23] I. Kennedy, "Treatment Without Consent (Sterilisation): Adult; *Re W (A Patient)*" (1993) 1 *Med L Rev* 234.
[24] *Ibid.*, 236.
[25] See *e.g. Frenchay Healthcare NHS Trust v. S* [1994] 1 WLR 601, Sir Thomas Bingham MR, 609: "Returning, therefore, to the fundamental question, what is in the best interests of the patient, I find no reason to question the answer which the consultant has given and the answer which the plaintiff hospital

Bolam test and best interests, arguing that it effectively undermined the best interests tests, on the basis that doctors treating a patient in accordance with the *Bolam* test would be deemed to be treating her in accordance with her 'best interests', yet treating someone in her best interests ought to mean more than not treating them negligently, since the concept of best interests connoted "optimal" rather than "reasonable" care. [26]

The apparent conflation of the best interests test and the *Bolam* test in *Re F,*[27] may have occurred partly because there was no real analysis of whether it was in F's best interests to be sterilised by the appellate courts, it having been accepted by all of the parties that it was by the time that the case reached the Court of Appeal.[28] Most of the argument before the Court of Appeal and House of Lords was directed to the question of jurisdiction and not to the facts of the case.[29] This link between the two tests was subsequently apparently accepted by the majority of House of Lords in *Bland,*[30] although Lord Mustill expressed doubts about the application of the *Bolam* test to decisions in relation to best interests in circumstances where a decision was being made as to whether the conduct of doctors would amount to a criminal offence:

> I accept without difficulty that this principle applies to the ascertainment of the medical raw material such as diagnosis, prognosis and appraisal of the patient's cognitive functions. Beyond this point, however, it may be said that the decision

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trust propounds". This has been criticised for being an inadequate determination of best interests: M.Donnelly, "Decision-making for Mentally Incompetent People: The empty formula of best interests?" [2001] *Med Law* 405, 410, fn.18.

[26] H.Teff, *Reasonable Care: Legal perspectives on the doctor-patient relationship* (1994), 52.

[27] [1990] 2 AC 1. Particularly by Lord Goff ,78, although he did indicate that relatives and carers should be consulted "as a matter of good practice". *C.f.* Wood J in *T v. T* [1988] 1 All ER 613, who adopted a "best medical interests" approach.

[28] See Lord Donaldson MR,.11; Butler-Sloss LJ, 34; Lord Brandon, 54.

[29] *C.f.* Neill LJ, 25 and the submissions made by counsel before the House of Lords, 43-51.

[30] *Airedale NHS Trust v.* Bland [1993] 1 All ER 821, Lord Keith, 861, Lord Goff, 871-872 and Lord Browne-Wilkinson, 882. *C.f. Frenchay Healthcare NHS Trust v. S* , (n.25).

> is ethical, not medical, and that there is no reason in logic why on such a decision the opinion of doctors should be decisive.[31]

This interpretation of the "best interests" test was heavily criticised by commentators,[32] and, according to the Law Commission, did not find general favour with the medical profession.[33] The Law Commission suggested that the intended effect may have been to require that (i) the doctor must meet the *Bolam* standard of care to avoid being negligent and (ii) the doctor act in an incapacitated person's best interests.[34] The positon was eventually clarified by the Court of Appeal in *Re A (Medical Treatment: Male Sterilisation)*("*Re A*"):[35]

> Another question which arises from the decision in *Re F* is the relationship of best interests to the '*Bolam* test'...Doctors charged with the decisions about the future treatment of patients and whether such treatment would, in the cases of those lacking capacity to make their own decisions, be in their best interests, have to act at all times in accordance with a responsible and competent body of

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[31] *Ibid.*, 898-899. Since the point was not determinative of the appeal, he declined to express a final opinion on the matter.

[32] See *e.g.* : M. Brazier, "Competence, consent and Proxy Consents", in M. Brazier and M.Lobjoit, "Protecting the Vulnerable: Autonomy and Consent in Health Care" (1991), 35; G. Richardson, "Reforming Mental Health Laws: Principle or Pragmatism?" (2001) *CLP*, 415, 428; N. Cica, "Sterilising the Intellectually Disabled: The Approach of the High Court of Australia in Department of Health v. J.W.B. and S.M.B." (1993) Med. L.Rev. 186, 215. *C.f.* I. Kennedy, *Treat me Right* (1991) Ch.20, 398-403 and L.Com., Consultation Paper No.119, *Mentally Incapacitated Adults and Decision-Making: An Overview* (1991), paras 2.22-2.24 and notes thereto.

[33] L. Com,. Report No. 231, *Mental Incapacity* (1995), para 3.26:

> No medical professional or body responding to Consultation Paper No.129 argued in favour of retaining such a definition of "best interests". Many were extremely anxious to see some clear and principled guidance given as to what "best interests" might involve. The British Medical Association, for its part, supported our provisional proposals for statutory guidance "without reservation.

[34] *Ibid.*, paras. 3.26-3.27 and fn.40.

[35] [2000] 1 FCR 193. A was a man of 28 with Down's syndrome, who was assessed as being on the borderline between significant and severe impairment of intelligence. His mother was concerned that, when he moved into the care of the local authority, he might form a sexual relationship and father a child and would be unable to understand the consequences of his actions. As she strongly disapproved of a man evading his responsibilities, she applied for a declaration that a vasectomy was in his best interests and could lawfully be performed despite A's inability to consent. The application was refused at first instance and the Court of Appeal dismissed the mother's appeal on the basis that an invasive operation would not be in A's best interests: neither the fact of the birth od a child nor disapproval of his conduct would be likely to affect A to a significant degree, and an operation would not save him from exploitation or help him to cope with the emotional implications of any close relationships that he might form.

> relevant professional opinion. That is the professional standard set for those who make such decisions. The doctor, acting to that required standard, has, in my view, a second duty, that is to say, he must act in the best interests of a mentally incapacitated patient. I do not consider that the two duties have been conflated into one requirement. In any event, in the case of an application for approval of a sterilisation operation, it is the judge, not the doctor, who makes the decision that it is in the best interests of the patient that the operation be performed.[36]

This approach was confirmed in the case of *Re SL*.[37] In that case the mother of a 28 year-old woman, S, sought a declaration that it was in her daughter's best interests to undergo a sterilisation operation and/or hysterectomy. The mother's concerns were essentially twofold. First, that S suffered from heavy menstrual bleeding during her periods, which she did not understand, which caused her distress, and with which she had difficulty coping, and second, that S might become pregnant, either as a result of forming an emotional attachment with a man, or by being sexually exploited.[38] It was agreed that pregnancy would be "disastrous" for S.[39] Wall J., applying the *Bolam* test to the determination of best interests,[40] ruled that whilst a hysterectomy was the most appropriate treatment, the insertion of a Mirena coil, although a less appropriate treatment, would also be lawful, and left the decision as to which treatment took place to be negotiated between the mother and the doctors.[41] The Court of Appeal ruled that Wall J. had erred in applying the *Bolam* test to the issue of S's best interests. The *Bolam* test was relevant to the question of whether treatment was necessary, in the sense of being "within the range of acceptable opinion among competent and responsible

[36][2000] 1 FCR 193, Dame Elizabeth Butler-Sloss, P., 200-201. For a discussion of this case see P. Fennell, "Sterilisation of Mentally Incapacitated Man: *Re A (Medical Treatment: Sterilisation)*" (2000) 8 *Med L Rev* 256.
[37] *Re SL (Adult Patient)(Medical Treatment)* [2000] 2 FCR 452 (CA), also reported as *Re S (Sterilisation: Patient's Best Interests)* [2000] 2 FLR 389.
[38] *Re SL (Adult Patient)(Medical Treatment)* [2000] 1 FCR 361, Wall J, 364.
[39] *Ibid.*
[40] *Ibid.*, 366.
[41] *Ibid.* 378-379.

practitioners",[42] but not relevant to the decision which the judge has to make as to the best interests of the patient, a decision which "ought to provide the best answer not a range of alternative answers",[43] since "the best interest test ought, logically, to give only one answer".[44]

Pragmatism and shifting doctrinal boundaries

In Chapter 1, I suggested that one of the main features of pragmatic decision-making was its focus upon 'what works' in practice, rather than a strict adherence to principle. This is not to say that pragmatic decision-making does away with principle, but that, in an appropriate case, where a judge is of the view that following an established legal norm will lead to what she regards as the 'wrong' decision, doctrinal boundaries will be side-stepped or expanded to achieve what she sees as being the correct outcome.[45] Such an approach is, however, open to criticism, on the basis that it interferes with the coherence and rationality of legal doctrine.[46] So far as the use of the justification of necessity in medical law cases is concerned, I suggest that an examination of the case law supports the assertion that judges are steering a pragmatic, rather than a principled course. In cases where it is apparently difficult to accommodate the judicial view of the most appropriate outcome within pre-existing doctrinal limits, judges were willing to expand or even occasionally side-step elements of the justification to enable them to

[42] *Re SL (Adult Patient)(Medical Treatment)* [2000] 2 FCR 452, Butler-Sloss, P, 465.
[43] *Ibid.,* Butler-Sloss, P, 464.
[44] *Ibid. C.f.* Thorpe LJ, 467. For further discussion of this case see *e.g.* P. Fennell, "Sterilisation of Learning Disabled Woman for Menstrual Management and Contraception: *Re S.L. (Adult Patient) (Medical Treatment)* [2000] 8 *Med L Rev* 261, 262-265.
[45] Above, 36-38.
[46] Above, 38-39.

reach what they perceive to be the 'right' outcome. Examples of this approach may be found both in relation to the issue of necessity and the use of the *Bolam* principle, and to the use of the 'best interests' test.

Necessity and the *Bolam* principle

As I have indicated, following the Court of Appeal decisions in *Re* A and *Re SL*, the *Bolam* principle was relevant to the issue of whether a proposed course of treatment or care is necessary: the treatment or care must be "in accordance with a responsible and competent body of relevant professional opinion".[47] However, the case of *Simms* v. *Simms*[48] highlights some of the difficulties that may arise in relation to the use of the *Bolam* test in this context in cases where novel or highly experimental treatment is proposed. The case involved an 18 year-old incapacitated adult, Jonathan Simms, and a female minor known as JA,[49] both of whom were suffering from probable variant Creutzfeldt-Jakob disease ("CJD").[50] The parents of both patients sought declarations that it would be lawful to treat them by intercerebral infusion of Pentosan Polysulphate ("PPS").[51] However, this proposed treatment was untested in humans, and unlicenced for

[47] *Re A* [2000] 1 FCR 193, 200. See also: *Re SL* [2000] 2 FCR 452, 465 and above, 245-246. This approach was followed in *Simms v. Simms* [2002] EWHC 2734 (Fam); [2003] Fam 83, [42].
[48] [2002] EWHC 2734 (Fam); [2003] Fam 83.
[49] As JA was 16 a minor, the Court was able to order that the treatment upon her be carried out by virtue of its parens patriae jurisdiction and the Children Act 1989 (*Ibid.*, Butler-Sloss, P, [71].
[50] A prion disease: "one of a group of rare and fatal neurodegenerativer disorders which also includes sporadic CJD, Kuru, inherited and iatronic prion disease", (*Ibid*., [2]). *C.f.* J.A. Harrington, "Deciding Best Interests: Medical Progress, Clinical Judgment and the 'Good Family'", (2003) 3 *Web JCLI* (http://webjcli.ncl.ac.uk/2003/issue3/harrington3.html), 2-3. The median time from the onset of symptoms to death in vCJD patients is 14 months: I. Bone, "Intraventricular Pentosan Polysulphate in human prion disorders" (2006), www.cjd.ed.ac.uk/bone.pdf, 118.
[51] PPS is obtained from beechwood bark shavings and has a structural formula similar to heparin. It has anti-coagulant properties and has been used as an oral treatment for interstitial cystitis, radiation induced cystitis and chronic pelvic pain syndrome: *Ibid.*, 5-6; R.S.G. Knight, "Potential Treatments for Creutzfeldt-

this purpose.[52] It had been found to inhibit the formation of abnormal prion protein in scrapie-infected mice in Japan,[53] although there had been no validation of this experimental treatment.[54] In the light of these factors, it might be said that there was not a "responsible body of medical opinion" which would support the treatment.[55] Evidence was heard from four medical witnesses, none of whom entirely ruled out the possibility of the treatment resulting in some benefit to the patients, namely a prolongation of their life or a temporary halt or slowing of the disease's progress or a possible improvement in the patients' condition, although it was accepted by all that the chances such benefit occurring were speculative and that the patients would not recover.[56] The risks of the

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Jakob Disease" (updated 2006), http://www.cjd.ed.ac.uk/TREAT.htm , 3. In cases of vCJD, PPS has to be administered directly into the brain because if taken orally it would not cross the blood-brain barrier: Knight, *ibid*., 7.

[52] *C.f*. DoH, "Use of Pentosan Polysulphate in the treatment of, or prevention of vCJD", http://www.doh.gov.uk/cjd/pentosan.htm (updated 7 February 2003) . Thewebsite may now be found at: http://www.dh.gov.uk/en/Publichealth/Communicablediseases/CJD/CJDGeneralInformation/DH_4031039. The advice from the CJD Therapy Advisory Group (2003) was that there was insuccifient clinical data to support a claim that PPS was an effective treatment for vCJD and the Committee on the Safety of Medicines (CSM) gave similar advice in 2003, indicating that there was no evidence to support the use of PPS as a treatment in late stage vCJD: Knight (n.51) 12.

[53] [2002] EWHC 2734 (Fam); [2003] Fam 83, [11]-[21]. This research was conducted by Dr. Doh-ura, "a distinguished Japanese neuropathologist" [10]. His research findings have subsequently been published: K. Doh-ura, K. Ishikawa, I. Murakami-Kubo, K, Sasaki, S. Mohri, R. Race and T. Iwaki, "Treatment of Transmissible Spongiform Encephalopathy by Intraventricular Drug Infusion in Animal Models" (2004) 78 *Journal of Virology* 4999.

[54] *C.f*. DoH, "Use of Pentosan Polysulphate in the treatment of, or prevention of vCJD", http://www.doh.gov.uk/cjd/pentosan.htm (updated 7 February 2003) . Thewebsite may now be found at: http://www.dh.gov.uk/en/Publichealth/Communicablediseases/CJD/CJDGeneralInformation/DH_4031039. The advice from the CJD Therapy Advisory Group (2003) was that there was insuccifient clinical data to support a claim that PPS was an effective treatment for vCJD and the Committee on the Safety of Medicines (CSM) gave similar advice in 2003, indicating that there was no evidence to support the use of PPS as a treatment in late stage vCJD: Knight (n.51)12.

[55] [2002] EWHC 2734 (Fam); [2003] Fam 83, [48]-[49].

[56] Dr. Doh-ura indicated in his paper that "it remains to be established that this treatment has universal validity for the prion diseases, especially human illness", [18]. Mr. T, a consultant neurosurgeon at the hospital at which the patients were being treated, considered that the treatment "may not work in humans or may on work against CJD", although he believed that it "may have an effect on the accumulation of abnormal proteins in the brain", [22]. Dr. Knight, consultant clinical neurologist to the National CJD Surveillance Unit in Edinburgh, stated that there was a very theoretical chance of some benefit, although there was "no firm scientific basis and no evidence of efficacy and safety", [32]-[33]. Professor Will, a professor of clinical neurology and "a leading expert in this field" [34], who gave evidence at the request of the Official Solicitor, was not in favour of the treatment being given, apparently because of his view that there was "a significant risk of causing pain or distress if the treatment is given and very little prospect of

treatment were regarded as being the usual risks of anaesthetic and surgery,[57] plus a risk of infection of about 2%[58] and a risk of haemorrhage of about 5%.[59] In spite of this, the patients' families were very much in favour of the treatment being provided, seeing it as a last chance to halt the progress of the disease.[60] Butler-Sloss, P., stated that the *Bolam* test "ought not to be allowed to inhibit medical progress",[61] and made the declarations sought,[62] upon the basis that there was a responsible body of medical opinion which did not reject the research and that the medical evidence was that "it would not in itself be irresponsible or unethical to give the treatment to these patients".[63] She then proceeded to conclude that she was:

> ...satisfied, consistent with the philosophy that underpins the **"**Bolam Test", that there is a responsible body of relevant professional opinion which supports this innovative treatment.[64]

Harrington has described the approach taken in *Simms* as being an extremely "weak" version of the *Bolam* test,[65] and this comment would appear to be well-founded. First, the Court took as the "responsible body of relevant professional opinion" the views or three of the four expert witnesses who gave evidence in the proceedings, who were, in any event, extremely tentative about the possibility of the treatment providing any benefit

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any benefit", [37]. Butler-Sloss, P. concluded that these views were based upon an erroneous interpretation of experiments conducted by Dr. Doh-ura upon infected mice, [41].

[57] [2002] EWHC 2734 (Fam); [2003] Fam 83, [28], [53], [55].

[58] *Ibid.*,[28], [53].

[59] *Ibid.*, [28] [53], [56].

[60] *Ibid.*,[5]-[6].

[61] *Ibid.*, [48], referring to *Sidaway v. Board of Governors of the Bethlam Royal Hospital and the Maudsley Hospital* [1985] 1 AC 871, Lord Diplock, 893.

[62] *Ibid.*, [73].

[63] *Ibid.*, [49].

[64] *Ibid.*

[65] J.A. Harrington, "Deciding Best Interests: Medical Progress, Clinical Judgment and the 'Good Family'", (2003) 3 *Web JCLI* (http://webjcli.ncl.ac.uk/2003/issue3/harrington3.html).

to the patients.[66] There is no requirement that this responsible body of professional opinion be substantial: a small number of tertiary specialists who are expert in a particular field may "constitute a responsible body of medical opinion",[67] although a court will need to distinguish between "practitioners engaged in treatment at the very boundaries of current knowledge and expertise",[68] and those adopting unacceptable experimental treatment.[69] This determination will involve a risk/benefit assessment in relation to the treatment, as the judge "will need to be satisfied that in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter".[70] Second, the treatment seems to have been permitted, not upon the basis of medical opinion being in favour of the treatment, or upon the basis that the treatment was responsible or ethical, but because of an absence of medical opinion rejecting the research or finding the treatment to be irresponsible or unethical.[71]

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[66] Above (n.56).The *Bolam* test does not require that there be that there be only one body of opinion with regard to a particular treatment: provided that there is a "responsible body of relevant opinion" in favour of a treatment, the fact that there is a body against will not make it negligent to give the treatment. At the time of the application in *Simms* the weight of medical opinion appears arguably to have been against the treatment, which was not approved by the Department of Health ((n.52) above) or authorised by the relevant hospital committees ([2002] EWHC 2734 (Fam); [2003] Fam 83, [74]). These particular committees declined to authorise the treatment following the judgment (*c.f.* G. Douglas, case comment at [2003] 33 *Fam Law* 317 (May). Jonathan Simms was eventually treated in Northern Ireland: O. Dyer, "Family finds Hospital Willing to give Experimental CJD Treatment" (2003) 326 *BMJ* 8: O. Wright, "Trust agrees to perform radical CJD operation" (2002) *Times*, December 24.

[67] *De Freitas v. O'Brien* [1995] P.I.Q.R. P281 (CA), Otton LJ, 289-291.

[68] I. Kennedy, "Negligence: Breach of Duty: Responsible Body of Opinion", [1995] 2 *Med L Rev* 195, 198. See *e.g. Waters v. West Sussex Health Authority* [1995] 6 Med L R 362. *C.f. Cryderman v. Ringrose* [1977] 3 W.W.R. 109, Stevenson DCJ, [19]; (affirmed [1978] W.W.R. 481).

[69] See *e.g. Waters v. West Sussex Health Authority* [1995] 6 Med L R 362; *The Creutzfeldt-Jakob Disease Litigation, Plaintiffs v.United Kingdom Medical Research Council* (1996) 54 BMLR 8.

[70] *Bolitho v. City and Hackney HA* [1998] AC 232, Lord Browne-Wilkinson, 242. *C.f. Reynolds v. North Tyneside HA* [2002] Lloyds Rep Med 459, Gross J, [19]; *Simms*, n.57, [51].

[71] *Simms* (n.57) [48]-[49].

In Chapter 2, I examined the role that common sense plays in pragmatic judicial decision-making and suggested that there is an expectation that judges will exercise common sense when deciding cases, and that it is implicit in our understanding of common sense views that they have some 'grounding' in majority community values.[72] In making common sense decisions, we draw upon our 'stock of knowledge', which will include familiar and accepted cultural conventions and even stereotypical views about how people behave.[73] I also considered the use made by judges of common sense views when they are departing from settled legal practice or seeking to expand legal rules, with one of the merits of the common law being seen to be its flexibility and its ability to change in order to keep in touch with societal attitudes.[74] Common sense may be particularly useful in 'hard cases', with judges using it as an aid to steer them towards the most appropriate judgment.[75] Harrington has commented that the decision in Simms was "built upon a number of commonsense assumptions regarding the nature of medical practice and the role of the patient and their family",[76] and I suggest that this interpretation of the judgment is well-founded.

In relation to the role of the family, the "stock image...of the 'good family' selflessly caring for the patient",[77] was evidently drawn upon by Dame Butler-Sloss P. in reaching her decision. This was a tragic case, concerning two young people who had been

[72] Above, 63-65.
[73] Above, 71-72.
[74] Above, 61.
[75] *Ibid.* See *e.g. Re F* [1990] 2 AC 1, Lord Donaldson MR, 17; *Bland* [1993] AC 789, Lord Browne-Wilkinson, 879.
[76] Above (n.65) 1.
[77] *Ibid.*, 9.

"struck down by an appalling and fatal disease",[78] and the judge was clearly heavily influenced by the devotion shown by their families and the deep distress which these families would suffer if the treatment were not to be given.[79] The selfless and heroic nature of the families' work in caring for the patients is emphasised in the judgment: their dedication is decribed as being "exceptionally high",[80] and the fact that both patients were still alive was said to be a "tribute" to their "outstanding care".[81] Faced with a situation in which the proposed treatment was the only hope of prolonging life or arresting the continuing neurological decline of the patients, it is hardly surprising that the Court felt that any treatment which might be beneficial ought to be tried: in such circumstances, the permitting of a 'last chance' experimental treatment appears to be the common sense option. [82]

Harrington has also suggested that Butler-Sloss's ruling was influenced by common sense 'stock' views in relation to medical practice, in particular, the notion of medicine as a progressive science.[83] This 'stock' approach portrays the practice of

[78] *Simms* (n.57) [1]. *Cryderman v. Ringrose* [1977] 3 W.W.R. 109 (affirmed [1978] W.W.R. 481). *The Creutzfeldt-Jakob Disease Litigation, Plaintiffs v.United Kingdom Medical Research Council* (1996) 54 BMLR 8, [1].
[79] *Simms* (n.57) [64].
[80] *Ibid.*, [2].
[81] *Ibid.*, [9].
[82] As far as the outcome is concerned, in the case of Jonathan Simms the treatment appears to caused some improvement to his condition, although the progressive brain atrophy continued whilst the drug was being administered: N.V. Todd, J. Morrow, K. Doh-ura, S. Dealler, S. O'Hare, P. Farling, M. Duddy and N.G. Rainov, "Cerebroventricular infusion of pentosan polysulphate in human variant Creutzfeldt-Jakob disease", (2005) *Journal of Infection* 394. *C.f.* Lister, S, "Last-hope CJD drug working for teenager", (2003) *Times*, May 12, 7. He became one of the world's longest surviving patients with vCJD and died in March 2011: http://www.bbc.co.uk/news/uk-northern-ireland-12667709 (accessed 25.04.2011). Subsequent case studies of vCJD patients treated with PPS indicated a poorer outcome: *e.g.* I.R. Whittle, R.S.G. Knight and R.G. Will, "Unsuccessful intraventricular pentosan polysulphate treatment of variant Creutzfeldt-Jakob disease" (2006) 148 *Acta Neurochirgica (Wien)* 677; I. Bone (n.50) 28-130. The case of the minor patient, PA (whose identity was protected by injunction: [2002] EWHC 2734 (Fam); [2003] Fam 83, [75]), appears not to have been followed up by the press.
[83] Above (n.65) 9.

medicine as a scientific endeavour which is constantly evolving and improving, moving "continually from a state of (relative) unknowing to one of (relative) enlightenment".[84] In the context of making a decision as to whether to sanction innovative treatment, using such an approach will tend to point the decisionmaker firmly towards permitting the treatment, because a refusal may be seen as hindering the natural progression of modern medicine,[85] and because it recognises that there is a wider public interest "in not hindering its evolutionary development".[86] In the *Simms* case, I suggest that Butler-Sloss P. was clearly mindful of the possibility that a narrower interpretation of the *Bolam* test would interfere with work upon new therapies, which might in turn prevent new ground-breaking medical treatments or cures: "if one waited for the Bolam test to be complied with to its fullest extent no innovative work such as the use of penicillin or performing heart transplant surgery would ever be attempted".[87]

A third 'stock' image implicitly drawn upon by Butler-Sloss in her judgment is that of doctors as altruistic professional 'rescuers'. In Chapter 2, I suggested that rescue narratives provide a dominant model in relation to medical practice, with disease, illness and death being seen as evils and the doctor as the rescuer: "a heroic warrior against illness and despair",[88] and that the notion of the doctor as an altruistic professional serving the interests of the patient is one which has achieved wide acceptance by judges

[84] J.A. Harrington, "'Red in Tooth and Claw': The Idea of Progress in Medicine and the Common Law" (2002) 11 *Social and Legal Studies* 211, 221.
[85] *Ibid.*, 212.
[86] *Ibid.*
[87] *Simms* (n.57) [48].
[88] Walter M. Robinson, "The Narrative of Rescue in Pediatric Practice", in R. Charon & M. Montello *Stories Matter: The role of narrative in medical ethics* (2002) 97, at 98. Above, 80-81.

determining medical law cases.[89] In *Simms*, Butler-Sloss's judgment considers the interests of the patients,[90] the views of the families and the effect upon them of refusing treatment,[91] and touches upon wider considerations, such as medical progress and the benefits that may flow from it.[92] There is, however, no consideration of any interests which the medical profession might potentially have in pursuing an innovative treatment. Whilst I do not suggest that the medical practitioners involved in this case were acting in anything other than an entirely proper professional manner in the interests of their patients, this unspoken apparent assumption of medical altruism fails to pay due regard to the fact that, in relation to experimental therapies, the medical profession may also "have an eye to the scientific value of their work",[93] deriving benefits from conducting them, particularly if they prove to be successful.[94] There is inevitably some kudos to be obtained from successfully conducting experimental treatment, particularly if the outcome is seen as adding significantly to pre-existing medical knowledge. Such treatment frequently attracts positive media attention,[95] and scientific accounts of such treatments are likely to be accepted for publication in medical and scientific journals.[96]

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[89] See above, 80-81. J. Montgomery, "Medicine, Accountability and Professionalism" (1989) 16 *Journal of Law and Society* 319, 330; S. Sheldon, "'A Responsible Body of Medical Men Skilled in that Particular Art...': Rethinking the *Bolam* Test", in S. Sheldon and M. Thomson, *Feminist Perspectives on Health Care Law* (1998), 15, at 23-26. See *e.g. Roe v. Ministry of Health* [1954] 2 QB 66, Denning LJ, 83; *Wilsher v. Essex AHA* [1987] QB 730 (CA), Mustill LJ, 746.
[90] *Simms* (n.57), [57]-[58], [62]-[63].
[91] *Ibid.*, [64].
[92] *Ibid.*, [48].
[93] Harrington (n.65) 4.
[94] This point is made by A.D. Dreger in relation to surgery to separate conjoined twins: *One of Us: Conjoined Twins and the Future of Normal* (2004), 75-76.
[95] *E.g.* T. Harding, "Brain drug experiment gives hope to CJD sufferers" (2003) *Times*, September 27, 4 (re PPS and vCJD); J. Brocklebank, "'Lazarus' wonder pill that could wake coma policeman" (2008) *Daily Mail*, March 28 (re Zolpidem and PVS); R. Dunn, "The Miracle Man" (2004) *Daily Mail*, October 12 (An article upon the retirement of Professor Spitz and his work separating conjoined twins) and *C.f.* L. Rogers, "Siamese Survivor Ready to Go Home" (2001) *Sunday Times*, 18th March (re the separation surgery that followed *Re A (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961 (CA)).
[96] *E.g.* Doh-ura (n.53); Todd (n.82); Whittle (n.82); Claus and Nel (n.102).

The effect of positive publicity and publication is likely to be an increase in public and professional renown and reputation and this may in turn benefit the institution at which the treatment was conducted,[97] even possibly leading to additional funding for research projects. In addition, personal and professional satisfaction may be obtained from conducting successful experimental treatment: there is the professional satisfaction of overcoming the difficulty and/or novelty of the challenge and achieving a successful outcome for a patient, and of receiving expressions of gratitude from the patient's family.

On the one hand, this case illustrates the flexibility of the common law and its ability to adapt in the face of difficult or novel scenarios. However, it highlights a particular danger with common sense decision-making in relation to the *Bolam* test: that stereotypical or 'stock' images, such as 'the good family', 'the doctor as altruistic rescuer' and the notion of medicine as an inexorably progressive science, may be drawn upon by the judge and predominate, concealing views which suggest that a less experimental approach might be the most appropriate course for the patient.[98] This case may be seen as opening the door to necessity being used to justify highly experimental procedures being conducted upon incapacitated patients.

[97] In the case of private hospitals, involvement in ground-breaking treatments may also be used in promotional material. *E.g.* the Bijani conjoined twins, who were joined at the head, underwent separation surgery at the private Raffles Hospital in Singapore. The hospital used its website to publicise the operation before it took place (in a manner favourable to the hospital) and to appeal for funds: Anon (2003) "Seeking Separate Lives", Raffles Healthnews, Issue 1, at http://www.raffleshospital.com/news_room_03.html. This webpage was removed shortly after the twins died of massive blood loss during the operation. *C.f.* Dreger, (n.94) 174.

[98] Harrington (n.65) 4; Sheldon (n.89) 25.

The case of *An NHS Trust* v. *J*[99] provides a more recent example of a judge adopting a flexible approach to the *Bolam* test when making a decision in respect of the treatment of an incapacitated adult. In this case, J, a 53 year-old woman, had been in a persistent vegetative state ('PVS') for more than three years following a brain haemorrhage.[100] The NHS Trust responsible for her treatment, with the support of J's family,[101] had sought a declaration that it would be lawful to discontinue artificial nutrition and hydration ('ANH') and to allow her to die. However, prior to the hearing, a research article had been published,[102] which suggested that patients in PVS might, by the administration of Zolpidem, a drug used in the treatment of insomnia, be revived to a level of wakefulness which might enable them to communicate with others. Based on this article, the Official Solicitor opposed an immediate withdrawal of ANH, arguing that there should first be a trial of Zolpidem.[103] A leading independent expert on PVS, Professor Andrews, who provided the only expert opinion testimony at the hearing, expressed reservations about the validity of the published research results. In particular, he observed that neither of the authors of the article was experienced in the diagnosis of PVS and that they had used tests that were inappropriate to diagnose that state.[104] In his opinion it was also doubtful whether two of the patients discussed in the article were actually in PVS,[105] and he was sceptical as to whether the article provided any basis for

[99] [2006] EWHC 3152 (Fam), 94 BMLR 15. For further discussion of this case see: P. Lewis, "Case comment: Withdrawal of treatment from a patient in a permanent vegetative state: judicial involvement and innovative 'treatment'" [2007] *Med L Rev* 392.
[100] *Ibid.* [4].
[101] *Ibid.* [8]-[10].
[102] R. Clauss and W. Nel, "Drug induced arousal from the permanent vegetative state" (2006) 21 *Journal of Neuro Rehabilitation* 28. *C.f.* R. Khamisi, "Sleeping pill may rouse coma patient" (2006) *New Scientist*, May 24; S. Lister, "Sleeping pill that brought a coma victim back to life" (2006) *Times*, May 27.
[103] [2006] EWHC 3152 (Fam), 94 BMLR 15, [15]-[17].
[104] *Ibid.* [18], [24]-[25].
[105] *Ibid.* [18], [25].

suggesting that Zolpidem would have any effect on J. However, he accepted that the drug was "generally safe",[106] and saw "no reason why J should not be given a trial of treatment".[107] Potter J directed that a trial of the drug take place.[108] This was in spite of the medical expectation that the treatment would not be successful,[109] and the family's opposition to the use of Zolpidem because J had, when competent, expressed the wish that she would not wish to have her life prolonged in such circumstances,[110] and they were concerned that J's level of awareness might be raised so that she would become aware of her condition and be distressed by it.[111] The drug was not effective, and at a subsequent hearing, Potter J permitted ANH to be withdrawn so that J could be allowed to die.[112]

Potter J did not expressly consider whether the *Bolam* test was satisfied in his judgment, perhaps because the initial suggestion that this treatment should take place came, not from the medical practitioners, but from the Official Solictor,[113] and it is not clear from his judgment whether the issue was raised during argument. The case may

[106] *Ibid.* [18].
[107] *Ibid.*
[108] *Ibid.* [31]-[32].
[109] *Ibid.* [31].
[110] *Ibid.* [8]-[9].
[111] *Ibid.* [21]. *C.f.* M. Seamark, "Right-to-die woman wouldn't want to be kept alive, say family" (2006) *The Mail* , November 26.
[112] [2006] All ER (D) 73 (Jan). J died in December 2006: Lewis (n.99) 394. More recent research articles about the use of Zolpidem in patients in PVS suggest that the drug may produce a clinically significant response in a minority of patients (J. Whyte and R. Myers, "Incidence of clinically significant responses to Zolpidem among patients with disorders of consciousness: a preliminary placebo controlled trial" (2009) 88 *Am. J. Phys. Med. Rehabil* 410) and that the effects are transient (J.L. Shames and H. Ring, "Transient reversal of anoxic brain injury-related minimally conscious state after Zolpidem administration" (2008) 89 *Archives of Physical Medicine and Rehabilitation* 386. *C.f.* R. Singh, C. McDonald, K. Dawson, S. Lewis, A-M. Pringle, S. Smith and B. Pentland, "Zolpidem in a minimally conscious state" (2008) 22 *Brain Injury* 103.
[113] [2006] EWHC 3152 (Fam), 94 BMLR 15, [15]. *C.f.* L. Davidson, "Wakening the Dead: PVS Patients and Medical Welfare Applications" (2007) *Counsel* (June), 2.

perhaps be seen as an illustration of the pivotal role that the Official Solicitor plays in such hearings, since it appears that the trial of Zolpidem would not have taken place if counsel for the Official Solicitor had not raised the issue.[114] The manner in which the views of J's family is dealt with in the judgment is notably far more muted than the portrayal of the families in *Simms*, [115] perhaps because the family opposed the Official Solicitor's stance, although the family's concern throughout appears to have been J's welfare and that her wishes were respected. In common with *Simms*, the 'common sense' notion of medicine as a progressive science and a reluctance to interfere with its progress appears to have influenced both the Official Solicitor and the judge.[116] On one level, as Lewis has observed: "This was a relatively easy case involving an inexpensive medication, the risks and side effects of which were well understood".[117] The decision might be supported on a compassionate 'wing and a prayer' basis that any chance of improving the consciousness of a PVS patient to an extent where they might be able to communicate ought to be taken.[118] However, the family clearly felt that J was being used as a guinea pig and that a faint hope of medical progress had obscured her best interests.[119] The requirement that the *Bolam* test be met in relation to innovative treatment on incapacitated adults helps to protect vulnerable patients from exploitation as research subjects and ought not to be relaxed.[120]

[114] Davidson, *ibid.*
[115] [2006] EWHC 3152 (Fam), [9], [20]-[21], *c.f. Simms* (n.57), [2], [9], [64].
[116] Davison (n.113).
[117] Lewis (n.99), 399.
[118] Davison (n.113).
[119] See *e.g.* S. Woodward, "The Need to Understand Ethics" (2006) 10 *Brit Jo Neuroscience Nursing* 485; M. Henderson, "Patients, not guinea pigs" (2006) *Times*, December 9.
[120] For an examination of the history relating to human experimentation see *e.g.* P.M. McNeill, *The Ethics and Politics of Human Experimentation* (1993), Part I.

Necessity and best interests: vagueness and paradox

In Chapter 1, I suggested that Lord Goff's formulation of necessity in *re F* could be seen as a pragmatic attempt to try and restore the law's adequacy by filling an apparent gap in the law, and to rationalise and bring coherence to the law.[121] I further suggested that the formulation of legal principle in such circumstances might lead to the creation of paradoxical concepts, which in turn lead to tensions and contradictions within the law.[122] One of the ways in which these tensions and contradictions may be managed is to dilute or conceal the paradox by using vague concepts or principles to preserve at least an appearance of legal coherence or consistency.[123] As I have indicated, necessity defences inevitably import a certain amount of tension and instability into the law, because by permitting the justification of conduct which would otherwise be unlawful, they have potential to 'unpick' existing law.[124]

The principle of necessity used by the House of Lords in *re F* is essentially a paradoxical concept, in that the use of the label 'necessity' suggests that necessity is an essential element of the justification: that the medical treatment or care should in fact be 'necessary'.[125] Such an interpretation would be more in tune with the narrow interpretation of defences of necessity in civil and criminal litigation.[126] However, what the House of Lords was trying to achieve in *re F* was to establish what the legal basis was

[121] Above, 41-42, 47-48.
[122] Above, 40 onwards.
[123] Above, 46.
[124] Above, 173. See *e.g. L.B. Southwark* v. *Williams* [1971] Ch 734, Lord Denning, 744; Lord Edmund-Davies, 745-746.
[125] Above, 47-48.
[126] Above, Ch.5.

for the treatment of incapacitated adults was. Any necessity justification which was going to fill all or part of the lacuna in the law left by the ending of the *parens patriae* jurisdiction would clearly have to be broader than those which had been used in civil and criminal litigation. For, as Lord Bridge stated:

> ...if a rigid criterion of necessity were to be applied to determine what is and is not lawful in the treatment of the unconscious and the incompetent, many of those unfortunate enough to be deprived of the capacity to make or communicate rational decisions by accident, illness or unsoundness of mind might be deprived of treatment which it would be entirely beneficial for them to receive.[127]

It was apparent even in *re F* that necessity was being used in a much looser sense, and that, even if the justification of necessity provided the basis for the treatment being lawful, the key concept was the best interests of the patient.[128] The treatment did not have strictly to be necessary: certainly it is arguable that it is not necessary to perform a non-therapeutic sterilisation operation upon an adult woman who lacks capacity,[129] or to harvest bone marrow from a patient for the benefit of a relative,[130] or informally to admit and keep an incapacitated adult in a mental hospital even though he has carers who are willing to look after him.[131] A necessity justification which did not require treatment to be necessary might be vulnerable to criticism on the basis that it lacked coherence.

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[127] [1990] 2 AC 1, 56. See also: Lord Bridge, 56; Lord Goff, 77 and 75: "The principle is one of necessity, not of emergency", and Lord Jauncey, 83:

> I should like only to reiterate the importance of not erecting such legal barriers against the provision of medical treatment for incompetents that they are deprived of treatment which competent persons could reasonably expect to receive in similar circumstances. The law must not convert incompetents into second class citizens for the purposes of health care.

[128] Above,243-245. *C.f.* A. Grubb and D. Pearl, "Sterilisation – Courts and Doctors as Decision Makers" [1989] *CLJ* 380.

[129] See *e.g. Re F* [1990] 2 AC 1, *Re W (Mental Patient)(Sterilisation)* [1993] 1 FLR 381; *Re X (Adult Patient: Sterilisation)* [1999] 3 FCR 426.

[130] *Re Y (Mental Incapacity: Bone Marrow Transplant)* [1997] 2 FCR 172.

[131] *R* v. *Bournewood Community and Mental Health NHS Trust, ex p. L* [1999] 1 AC 458. *C.f. HL* v. *United Kingdom* (2005) 40 EHRR 761, where the ECtHR ruled that the use of the common law doctrine of necessity to justify the informal detention of incapacitated adults breached Art.5 ECHR. For a discussion of the ECtHR decision see *e.g.* K. Keywood, "Detaining mentally disordered patients lacking capacity: the arbitrariness of informal detention and the common law doctrine of necessity" (2005) 13 *Med L Rev* 108.

However, by linking the justification to the vague concept of best interests, it may be claimed that the justification has its roots in a pre-existing, much older justification of necessity, maintaining at least an illusion of legal consistency,[132] whilst in the concept of best interests there is a test which is sufficiently vague and flexible to allow judges to deal with a wide variety of cases in what they perceive to be the most appropriate manner.[133] 'Common law necessity' is perhaps best regarded as a hybrid justification, having elements of necessity, but being essentially a best interests justification. In addition, it may be said that there is a substantial public interest element to the justification because, as the House of Lords recognised in *re F*,[134] there is a public interest in ensuring that those who require treatment or care should receive it.

Expanding best interests

Having identified the inherent vagueness of the best interests test, I now turn to examine the concept of best interests and its development in the context of 'common law necessity' in more depth. The best interests test has certainly been expansively used. From being exercised initially in *re F* and early cases such as *re W*,[135] and *Re LC*,[136] in relation to the justification of medical treatment and care, the test has been used in a wide variety of cases: involving issues relating to where an incapacitated person lives and

[132] Above, Ch.5.
[133] Above, Ch.1, 46-46.
[134] [1990] 2 AC 1, Lord Brandon, 55; Lord Griffiths, 69.
[135] [1993] 1 FLR 381. See also*: e.g.Re H (mental patient)* [1991] 1 FLR 28; *Re JT (Adult: Refusal of Treatment)* [1998] 1 FLR 48; *Re X (Adult Patient: Sterilisation)* (1999) 3 FCR 426.
[136] [1997] 2 FCR 258.

with whom they have contact;[137] in relation to marriage, including allegedly forced marriages outside the jurisdiction,[138] and in relation to the restraint of the publication of matter which is damaging to an incapacitated adult.[139] In *Bournewood Community Mental Health N.H.S. Trust, Ex parte L*,[140] necessity was even held to justify the care and treatment in a mental hospital in the best interests of compliant incapacitated patients who had not been admitted pursuant to the provisions of the Mental Health Act 1983.

Although it has been stated by the Court of Appeal that, logically, there can only be one outcome that is in a patient's best interests,[141] the best interests test does not

[137] See *e.g. Re C (Mental Patient: Contact)* [1993] 1 FLR 940; *Re D-R (Adult: Contact)* [1999] 1 FLR 1161; *A* v. *A Health Authority* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213; *Re S (Adult's Lack of Capacity: Carer and Residence)* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235; *Re G (an adult) (Mental capacity: court's jurisdiction)* [2004] EWHC 222 (Fam), [2004] All ER (D) 33.

[138] See *e.g. Sheffield City Council* v. *E* [2004] EWHC 2808 (Fam), [2005] Fam 326; *M* v. *B, A and S (by the Official Solicitor)* [2005] EWHC 1681 (Fam), [2006] 1 FLR 117; *Re SK (Proposed Plaintiff)(An Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230; *A Local Authority* v. *MA, NA and SA* [2005] EWHC 2942 (Fam).

[139] *A Local Authority (Inquiry: Restraint on Publication)* [2003] EWHC 2746 (Fam), [2004] Fam 96; *E (By her Litigation Friend the Official Solicitor)* v. *Channel Four* [2005] EWHC 1144 (Fam), [2005] 2 FLR 913.

[140] [1999] 1 AC 458. For further discussion of the case see *e.g.* P. Fennell, "Doctor knows best? Therapeutic detention under common law, the Mental Health Act, and the European Convention", (1998) 6 *Med L Rev* 322. K. Keywood, "Detaining mentally disordered patients lacking capacity: the arbitrariness of informal detention and the common law doctrine of necessity", (2005) *Med L Rev* 108; J. Dawson, "Necessitous detention and the informal patient" (1999) 115 *LQR* 40. As Dawson indicates (40):

> According to the evidence referred to in the House of Lords, if all non-consenting patients had to be committed under the Mental Health Act 1983 in similar circumstances it would almost treble the daily census of committed patients in England and Wales, from 13,000 to 33,000 persons. Forty-eight thousand more compulsory admissions would occur each year and many more nursing homes would have to register to receive patients under the Act, with significant staffing and cost implications. Burdens would be placed on patients' families by the committal process; and there would, of course, be a significant redirection of resources from the clinical care of patients to the administrative tasks which committal entails.

Given these matters, it is unsurprising that the HL took a pragmatic course and extended the justification of necessity to cover such patients. Unfortunately, this approach did not provide adequate protection for the Art.5 ECHR rights of such patients: *HL* v. *United Kingdom* [2004] 40 EHRR 761.

[141] *Re SL (Adult Patient)(Medical Treatment)* [2000] 2 FCR 452, Butler Sloss P, 464.

operate as a rule which has a clear, "fixed, univocal meaning" [142] to be applied to the facts of case. Kennedy, before the decision in *re F*, described the test as being:

> ...not really a test at all, instead it is a somewhat crude conclusion of social policy. It allows lawyers and courts to persuade themselves and others that theirs is a principled approach to law. Meanwhile, they engage in what to others is clearly a form of "ad hocery".[143]

As a number of commentators have observed, the best interests test may be seen as operating as an "idealogical construction":[144] the determination of best interests depends very largely upon the judge's interpretation of the facts of the case and this determination is not value free, since it incorporates judgments about policy issues and the way in which families, the medical profession and society normally operate.[145] Assumptions may be made about the present and future capabilities of incapacitated adults, and about the respective roles of carers and the medical profession which draw upon common sense notions of how such people do or should behave. For example, both in *re F*, and in a number of the cases in which the High Court considered whether to grant a declaration sanctioning the sterilisation of incapacitated women in the early years following the House of Lords' decision in *re F*, emphasis was placed by the court upon the 'mental' or 'intellectual' age of the woman concerned, as being indicative of her cognitive abilities.[146] Yet, as Brazier has noted, the courts did not in any of these cases make any

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[142] Herrington (n.65), 9. *C.f.* T. Eckhoff, "Guiding Standards in Legal Reasoning" (1976) 29 *CLP* 205.
[143] I. Kennedy, *Treat Me Right*, (1988), 395.
[144] See *e.g.* J. Montgomery, "Rhetoric and Welfare" [1989] 9 *OJLS* 395, 396; J. Eekelaar, "'Trust the Judges' How Far Should Family Law Go?" (1984) 47 *MLR* 593, 595-596; J. Eekelaar, "Beyond the Welfare Principle" (2002) 14 *CFLQ* 237; J. Herring, "The Welfare Principle and Parents' Rights", in A. Bainham, S. Day Sclater and M. Richards (eds.), *What is a Parent? A Socio-Legal Analysis* (1999), Ch.5.
[145] Montgomery, *ibid.;* Eekelaar (1984), (n.144).
[146] *Re F* [1990] 2 AC 1 (actual age 36, mental age 4-5 years); *Re W (Mental Patient)(Sterilisation)* [1993] 1 FLR 381 (age 20, mental age about 7); *Re GF (Medical Treatment)* [1992] 1 FLR 293 (age 29, mental age about 5). See also the following cases concerning minors: *T v T* [1988] Fam 52 (age 19, mental age 2); *Re B*

attempt to examine what level of comprehension might actually be required for an intellectually disabled woman to understand in general terms the nature and purpose of a sterilization operation.[147] Nor was any account taken of the experience which the women concerned had accrued by virtue of their chronological age and the effect of that experience upon their understanding. A woman of 36 with a 'mental age' of a 5-year-old child will nevertheless have had "the experience of puberty and menstruation",[148] and will probably have been educated about how her body works.[149] This experience may, in spite of her disability, have provided her with knowledge and understanding about the workings of her own body beyond that which might be found in a child of five, but this issue is not explored by the courts.[150]

In a similar vein, reliance upon common sense assumptions in relation to medicine and medical practice may point judges firmly towards accepting a medicalised view of best interests. If one generally assumes that doctors are altruistic, professionals acting in the best interests of their patients, then medical opinion to the effect that a treatment is in the best interests of an individual is likely to be regarded as being highly persuasive, if not determinative of the issue.[151] Illustrations of this may be found in in the case of *An NHS Trust* v. *J*,[152] where even muted medical opinion in favour of treatment

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(A Minor)(Wardship: Sterilisation) [1987] 2 All ER 206 (CA), [1988] 1 AC 199 (HL) (age 17, mental age 5-6); *Re P (A Minor)(Wardship: Sterilisation)* [1989] 1 FLR 182 (age 18, mental capacity of a 6 year old).

[147] M. Brazier, "Competence, Consent and Proxy Consents", in M. Brazier and M. Lobjoit (eds.), *Protecting the Vulnerable: Autonomy and Consent in Health Care* (1991), Ch.4, 38-39.

[148] *Ibid.*, 39.

[149] *Ibid.*

[150] *C.f.* Montgomery (n.144), 388-389, in relation to the *re P* case (n.146).

[151] Above, 257-260.

[152] Above, 261-263.

appeared to outweigh the family's objections, and in the *Bournewood* case,[153] where the House of Lords, in considering whether an incapacitated adult had been lawfully detained in hospital, favoured the views of medical practioners over those of "paid carers".[154]

Following the initial lack of clarity in relation to the issue of whether 'best interests' was restricted to 'best medical interests',[155] the Law Commission in their 1995 report, *Mental Incapacity,*[156] proposed a "checklist" of matters which should be considered when a court was determining whether treatment is in a person's "best interests": [157]

(1) the ascertainable past and present wishes and feelings of the person concerned, and the factors that person would consider if able to do so;
(2) the need to permit and encourage the person to participate, or to improve his or her ability to participate, as fully as possible in anything done for and any decision affecting him or her;
(3) the views of other people whom it is appropriate and practicable to consult about the person's wishes and feelings and what would be in his or her best interests;
(4) whether the purpose for which the action or decision is required can be as effectively achieved in a manner less restrictive of the person's freedom of action.

These guidelines may have helped to structure judicial decision-making in relation to the issue of best interests and encourage judges to provide reasons which appear to accord with the guidelines.[158] However, the determination of best interests nevertheless remains heavily dependent upon the judge's interpretation of the facts: a narrative of the case created by the judge. Common sense assumptions used by the judge to reach her

[153] [1999] 1 AC 458. Above, 269.
[154] *Ibid.*, Lord Goff, 488.
[155] Above, 246-251.
[156] L. Com., Report No.231. Above, 243.
[157] *Ibid.*, para 3.28:
[158] Montgomery (n.144), 402.

determination, even if recognised, may well be edited out of the judgment in favour of criteria which are regarded as complying more explicitly with the guidelines.[159]

The beginning of a shift away from an apparent interpretation of best interests as meaning "best medical interests" by the courts was signalled by the case of *Re Y (Mental Incapacity: Bone Marrow Transplant)*.[160] It was at least partly dictated by the facts of the case: the court was asked to sanction the harvesting of bone marrow from the defendant in order to save her sister's life. The operation was certainly of no physical benefit to Y and carried with it some medical risks,[161] but the court, in sanctioning the procedure, expanded the concept of best interests to include "emotional, psychological and social benefit"[162] to Y. Connell J held that, if the proposed donation did not take place and Y's sister died, her contact with her mother would be decreased because it would lead to a deterioration in the mother's health and by the fact that the mother's time would be taken up with the care of her grandchild and he concluded that such a reduction in contact would be harmful to Y.[163] In the circumstances, he held that the procedure was in Y's best interests, the potential benefit of the operation to her being the likelihood that it would prolong the relationship between Y and her mother and improve Y's relationship with both her mother and her sister.[164]

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[159] *Ibid.*, 396-401.
[160] [1997] Fam 110.
[161] The fact that the operation was potentially of enormous medical benefit to Y's sister was stated by Connell J not to be relevant save insofar as it served the best interests of Y. However, the basic truth of the case was that the purpose of the procedure was to benefit Y's sister. Any potential benefit to Y was incidental to that benefit and speculative. *C.f.* P.Lewis, "Procedures that are against the Medical Interests of Incompetent Adults" (2002) 22 *OJLS* 575.
[162] [1997] Fam 110, Connell J, 116.
[163] *Ibid.*, 115.
[164] *Ibid.* Kennedy and Grubb suggest that the case is "probably an unusual one in that it concerned a procedure which does have minimal risks for the donor" and that this appears to be supported by Connell

On one level, the case may be regarded purely as an instance of pragmatic judicial decision-making, with Connell J being willing to stretch or side-step principle in order to reach what he regarded as the 'right' decision in a case where there was evident sympathy for the mother and sister. As Laurie has suggested:

> ...it is unclear whether the court is concerned with the incapax's "best" interests or her "better" interests. It may be in a person's "better" interests to improve her relationship with her mother, but whether it is in her "best" interests to undergo non-therapeutic medical intervention in order to do so is less obvious.[165]

This expansion of 'best interests' may, however, also be seen as demonstrating the essential vagueness and flexibility of the test, allowing the concept to be expanded beyond mere medical interests so that it resembles a broad welfare test.

That the test of best interests was "not limited to best medical interests"[166] was confirmed by the Court of Appeal in the case of *Re MB (Medical Treatment),*[167] in which it was made apparent that such decisions needed to be approached on principles similar to those used when determining the welfare of a child,[168] with relevant information about a

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J's indication (at 116), that it was "doubtful that this case would act as a useful precedent in cases where the surgery involved is more intrusive than in this case": I. Kennedy and A. Grubb, *Medical Law*, 3rd edn. (2000), 789. *C.f. Strunk* v. *Strunk* (1969) 445 SW2d 145; *Hart* v. *Brown* (1972) 289 A 2d 386; *Little* v. *Little* (1979) 576 SW 2d 493; *Curran* v. *Bosze* (1990) 566 NE 2d 1319.

[165] G.T. Laurie, "Parens Patriae in the medico-legal context: The vagaries of judicial activism", (1999) 3 *Edin LR* 95, 103.

[166] [1997] 2 FCR 541, 555

[167] [1997] 2 FCR 541. See also *Re A (Medical Treatment: male sterilisation)* [2000] 1 FLR 549.

[168] *C.f.* Children Act 1989, s.1: in determining any question in relation to the upbringing of a child the child's welfare is the "paramount consideration" (s.1(1)). S.1(3) sets out a non-exhaustive 'welfare checklist':

> (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
> (b) his physical, emotional and educational needs;
> (c) the likely effect on him of any change in his circumstances;
> (d) his age, sex, background and any characteristics of his which the court considers relevant;

patient's circumstances and background being made available to a judge (time permitting).[169] This interpretation of best interests as a broad welfare test was confirmed by the Court of Appeal in *Re S (Adult Patient: Sterilisation)*:[170] the judge is to have regard to the patient's welfare as the paramount consideration, incorporating "broader ethical, social, moral and welfare considerations".[171] In relation to this interpretation of best interests, in *Re A (Male Sterilisation),*[172] Thorpe LJ suggested the use of a 'balance sheet' approach, listing the advantages and disadvantages of the proposed course for the patient:

> There can be no doubt in my mind that the evaluation of best interests is akin to a welfare appraisal … Pending the enactment of a checklist or other statutory direction it seems to me that the first instance judge with the responsibility to make an evaluation of the best interests of a claimant lacking capacity should draw up a balance sheet. The first entry should be of any factor or factors of actual benefit … Then on the other sheet the judge should write any counterbalancing dis-benefits to the applicant … Then the judge should enter on each sheet the potential gains and losses in each instance making some estimate of the extent of the possibility that the gain or loss might accrue. At the end of that exercise the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses. Obviously, only if the account is in relatively significant credit will the judge conclude that the application is likely to advance the best interests of the claimant.[173]

Such an approach may help to guide a judge towards considering the relevant factors, but does not guarantee that matters which are highly relevant, particularly from a human rights perspective, will be taken into account in the decision-making process: for

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(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question.

See *e.g.* J. Herring, *Family Law*, 4th edn. (2009), 499-501.

[169] [1997] 2 FCR 541, 555.

[170] [2001] Fam 15 (also known as *re SL (Adult Patient)(Medical treatment)* [2000] 2 FLR 389.

[171] *Ibid.*, Dame Butler-Sloss P , 28; *c.f.* Thorpe J, 30 : "…it would be undesirable and probably impossible to set bounds to what is relevant to a welfare determination". In *re A (Male Sterilisation)* [2000] 1 FLR 549, Butler-Sloss LJ had stated that: "best interests encompasses medical, emothional and all other welfare issues" (at 560). This statement was approved in *re S* ,24.

[172] [2000] 1 FLR 549.

[173] *Ibid.*, 560.

example, although Thorpe LJ in *Re A* used the balance sheet approach and purported to take into account the Law Commission guidelines discussed above, he failed to make any reference to the ascertainable wishes and feelings of A, who apparently did not want the operation to take place.[174]

Necessity or best interests?

Although in *re F* the House of Lords held that necessity justified treatment and care in the best interests of incapacitated adults, doubts have been raised as to whether the courts in subsequent cases have been applying a justification of necessity or developing one of 'best interests'. For example, Montgomery has suggested that the justification is a "best interests" justification,[175] an approach which appears to be adopted by Jackson[176] and Brazier and Cave,[177] whilst other commentators have regarded the justification as being one of necessity, even though the essential question is whether the treatment or care is in the best interests of the patient.[178] Most of the cases *post re F* do not mention necessity, but intead focus upon a consideration as to whether the treatment or care is in

[174] *Ibid.* See: M. Donnelly, "Decision-making for Mentally Incompetent People: The Empty Formula of Best Interests?" (2001) Med. Law 405. Under the MCA 2005, s.1(5) it is a principle of the Act that any act or decision for or on behalf of a person who lacks capacity, must be in that person's best interests. Guidance re the determination of best interests is set out in s.4 of the Act and Ch.5 of the CoP. In *In the matter of P* [2009] EWHC 163 (Ch), [2010] 2 WLR 253, Lewison J. indicated that it appeared that in the MCA "Parliament has endorsed the 'balance sheet' approach" ([41]).
[175] J. Montgomery, *Health Care Law,* 2nd edn. (2003), 241.
[176] E. Jackson, *Medical Law: Text, Cases and Materials*, 2nd edn. (2009), 236. .*C.f.* J. McHale and M. Fox, *Health Care Law*, 2nd edn. (2007), 291-292, 320
[177] M. Brazier and E. Cave, *Medicine, Patients and the Law*, 5th edn. (2011), 150-152.
[178] See *e.g.* B. Hoggett, *Mental Health Law*, 4th edn., (1996), 136-137 (*c.f.* B. Hale, *Mental Health Law*, 5th edn, (2010), 14-17); A. Grubb (ed.), *Principles of Medical Law,* 2nd edn. (2004), paras. 4.107-4.108; J.K. Mason and G.T. Laurie, *Mason and McCall Smith's Law and Medical Ethics* 8th edn. (2010), 81-83; P. Bartlett, *Blackstone's Guide to the Mental Capacity Act 2005*, 2nd edn. (2008), 26-27.

the incapacitated adult's best interests,[179] although in *Bournewood Community Mental Health N.H.S. Trust, Ex parte L*[180] the House of Lords clearly used necessity to justify L's detention, and in *re F (Adult: Court's Jurisdiction),*[181] Dame Elizabeth Butler-Sloss P indicated that the lawful basis for the making of declarations regulating future arrangements for an incapacitated adult was the doctrine of necessity.[182]

Certainly it is arguable that, following *re F* we have seen the development of a 'best interests' justification, although there is, as I indicated in Chapter 6, some doctrinal difficulty in relying upon best interests alone to justify the provison of treatment and care.[183] I have suggested that a better approach doctrinally would be to see the expansion of the concept of best interests as being an instance of practical-minded common law judges expanding an already vague test to meet the task before them.

From justification to new jurisdiction?

It is clear from a review of the authorities following the House of Lords decision in *re* F that the courts used and expanded the concept of best interests to the extent that it might be regarded as a welfare test similar to that used in respect of children and previously used in respect of adults under the former *parens patriae* jurisdiction.[184] In *re F,* Lord Goff had made it apparent that he saw "little, if any practical difference between

[179] See *e.g. Re X (Adult Patient: Sterilisation)* [1999] 3 FCR 426; *Re S,* (n.86); *Re A* (n.83).
[180] [1999] 1AC 458.
[181] *Re F (Adult: Court's Jurisdiction)* [2001] Fam 38.
[182] This view was reiterated in *re A Local Authority (Inquiry: Restraint on Publication)* [2003] EWHC 2746 (Fam), [2004] Fam 96, considered below.
[183] Above, 234-237.
[184] See: *Re MB (Medical Treatment)* [1997] 2 FCR 541, 555; *Re SL (Adult Patient)(Medical Treatment)* [2000] 2 FLR 389; *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FLR 549, 560; Laurie (n.164).

seeking the court's approval under the parens patriae jurisdiction and seeking a declaration as to the lawfulness of the operation",[185] using the 'principle' of necessity. The fact that the courts had effectively set up what could properly be regarded as a substitute to the *parens patriae* jurisdiction was acknowledged in a number of cases from the mid 1990s onwards. In *re G (Adult Patient: Publicity)*,[186] Sir Stephen Brown, P. Commented that: "The jurisdiction is not strictly the exercise of a parens patriae jurisdiction but is similar to it and the speech of Lord Brandon in *re F*...does in fact provide the foundation for that approach".[187] In *re S (Adult Patient: Sterilisation)*[188] Thorpe LJ, having referred to the above passage in *re G*, and stated that:

> It seems to me to be a distinction without a difference, by which I mean that the parens patriae jurisdiction is only the term of art for the wardship jurisdiction which is alternatively described as the inherent jurisdiction. ...It therefore follows that whilst the decision in *In re F* signposted the inadvertent loss of the parens patriae jurisdiction in relation to incompetent adults, the alternative jurisdiction which it established, the declaratory decree, was to be exercised upon the same basis, namely that relief would be granted if the welfare of the patient required it and equally refused if the welfare of the patient did not.[189]

In a similar vein, in *A* v. *A Health Authority,*[190] Munby J recognised that the use of the declaratory jurisdiction had developed since *re F*,[191] stating that: "For most practical purposes the declaratory jurisdiction in relation to incompetent adults is the same as that

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[185] [1990] 2 AC 1, 83.
[186] [1995] 2 FLR 528.
[187] *Ibid.*, 530.
[188] [2001] Fam 26.
[189] *Ibid*., 29-30
[190] [2002] EWHC 18 (Fam/Admin).
[191] *Ibid.* [38]. See also: *Re S (Adult Patient)(Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, Munby J,[52]:

> The inherent declaratory jurisdiction has developed considerably since the House of Lords gave judgment in re F...and in ways which few might have foreseen in 1989. It will, I do not doubt, continue to develop...

of a court exercising the parens patriae jurisdiction".[192] He also signalled a willingness further to develop the jurisdiction:

> In the 12 years and more that have passed since the House of Lords gave judgment in *In re F*...the jurisdiction has developed in many important respects...I have little doubt that this wholesome and entirely beneficial jurisdiction will continue to develop at least until such time as the legislature sees fit to intervene.[193]

This *de facto* position was recognised in *re A Local Authority (Inquiry: Restraint on Publication),*[194] but at the same time, the President, Dame Elizabeth Butler-Sloss, made it clear that the lawful basis for the exercise of the inherent jurisdiction to grant declaratory relief was the "doctrine of necessity":

> ....the circumstances within which a court will exercise the inherent jurisdiction through the common law doctrine of necessity are not restricted to granting declarations in medical issues. It is a flexible remedy and adaptable to ensure the protection of a person who is under a disability. It has been extended to questions of residence and contact. Until there is legislation passed which will protect and oversee the welfare of those under a permanent disability the courts have a duty to continue, as Lord Donaldson of Lymington MR said in *re F*...to use the common law as the great safety net to fill gaps where it is clearly necessary to do so....The application of the inherent jurisdiction would seem more appropriately to be treated as the exercise of a "protective jurisdiction" rather than a "custodial jurisdiction"...[195]

However, something of a shift of approach may be discerned from the judgment of Munby J. in *E* v. *Channel Four Television Corporation*[196] where, having purpoted to agree with the President's above analysis, he then appeared to go somewhat further and suggest that the declaratory jurisdiction in respect of incapacitated adults was not merely

[192] [2002] EWHC 18 (Fam/Admin), [45].
[193] *Ibid.*, [38].
[194] [2003] EWHC 2746 (Fam), [2004] Fam 96. *C.f In re F (Adult: Court's Jurisdiction)* [2001] Fam 38, Butler-Sloss P, 45-47.
[195] *Ibid.*, [96]-[97].
[196] [2005] EWHC 1144 (Fam), [2005] 2 FLR 913.

for practical purposes 'like' the wardship or *parens patriae* jurisdiction, but actually was such a jurisdiction:

> The simple fact is that we have come a long way since the decision in In re F...The courts have created and now exercise what is, in substance and reality, a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established parens patriae or wardship jurisdiction in relation to children. Indeed the President's reference ...to the 'protective' and 'custodial' jurisdictions is a straight borrowing from wardship...[197]

An approach which he also adopted in *A Local Authority* v. *MA, NA and SA.*[198]

It might be said that, having expanded the concept of best interests to the extent that it *resembles* the *parens patriae* jurisdiction, it is a fairly short leap for judges to 'cut loose' from the underlying justification of necessity and to assert that it *is* a substitute 'protective jurisdiction'.[199] On one level, this may be seen as a mere matter of legal rhetoric. Alternatively, it may be suggested that, in practical terms it mattered little whether it is a substantive, or merely a declaratory jurisdiction, since whatever the basis for the jurisdiction, the outcome was that the same: common law judges were making pragmatic decisions as to the best interests of incapacitated adults. However, the legal effects of such a leap were potentially problematic. As I indicated in Chapter 4 above, the inherent jurisdiction of the High Court to grant jurisdictions is generally seen as being a jurisdiction to make declarations stating what the pre-existing law is.[200] In other words, when a court grants a declaration, it does not make conduct lawful, but merely states

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[197] *Ibid.*, [55]. *C.f. Re SK (Proposed Plaintiff)(An Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, where Singer J stated (at [8]):

> ...the inherent jurisdiction of the High Court can, in an appropriate case, be relied upon and utilised to provide a remedy...the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values.

[198] [2005] EWHC 2942 (Fam).

[199] *C.f.* G.Williams, "The Declaratory Judgement: Old and New Law in "Medical" Cases", [2007] 8 *Med L Int* 277, 282. Discussed above, Ch.4, 125-127.

[200] Above, 96.

whether conduct is lawful according to pre-existing substantive law.[201] Bartlett argues not merely that this expansion of the declaratory jurisdiction was based on legal error, stemming from "a dubious interpretation of *In re S (Hospital Patient: Court's Jurisdiction),*[202] but that it caused significant doctrinal tensions:

> ...the difficulty with expanding the declaratory jurisdiction into broad questions of best interests is that it is unclear what power the court is purporting to exercise. If the question is whether specified conduct will be tortious, it is clear what the court is declaring; but what, at common law, is the legal effect of a decision merely that a course of conduct is in the best interests of a person lacking capacity? If an individual does not abide by the court's decision, where is the illegality? It cannot be that a general decision-making authority has been violated: that authority was provided only under *parens patriae*, and that authority is gone. Is a cause of action created between the incapacitated person and the person not following the court's order? If so, we have a new tort, and there is no suggestion that the court wished to proceed in that direction. If not, is the individual in contempt of court? If so, a criminal sanction would be being used to enforce a court order enforcing a non-legal norm. If not, then the court order becomes unenforceable.[203]

These tensions may have been dissolved with the coming into effect of the Mental Capacity Act 2005, but significant questions remain as to the role of necessity in medical law.[204]

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[201] See above, 96.

[202] [1996] Fam 1. Sir Thomas Bingham MR suggested (18) that:

> where a serious justiciable issue is brought before the court by a party with a genuine and legitimate interest in obtaining a decision against an adverse party the court will not impose nice tests to determine the precise legal standing of that claimant.

Bartlett suggests that this passage was misinterpreted by the CA in *re F* [2001] Fam 38, in that the court in *re S* was considering the issue of standing, whereas the CA in *re F* took this passage as justifying the intervention of the court more generally in cases involving issues of controvery or momentous decisions in relation to the best interests of incapacitated adults: P. Bartlett, *The Mental Capacity Act 2005*, 2nd edn. (2008), 28.

[203] *Ibid.*, 29.

[204] Below, 288-289

Chapter 8

The Mental Capacity Act 2005: The End of Necessity?

Introduction: little change?

The whole of the Mental Capacity Act 2005 ("MCA") came into force on the 1st October 2007.[1] The Act creates a legal framework for decision-making in respect of incapacitated persons over the age of 16.[2] Its expressed aim was "to clarify a number of legal uncertainties and to reform and update the current law where decisions need to be made on behalf of others",[3] and it is intended to: "govern decision-making on behalf of adults, both where they lose mental capacity at some point in their lives, for example as a result of dementia or brain injury, and where the incapacitating condition has been

[1] The commencement of the MCA 2005 was staged, but the Act as originally passed by Parliament came fully into force on this date. See: The Mental Capacity Act 2005 (Commencement (No.1) Order 2006 (SI 2006/2814); The Mental Capacity Act 2005 (Commencement No. 1) (Amendment) Order 2006 (SI 2006/3473); The Mental Capacity Act 2005 (Commencement No.1) (England and Wales) Order 2007 (SI 2007/563); The Mental Capacity Act 2005 (Commencement)(Wales) Order 2007 (SI 2007/856); The Mental Capacity Act 2005 (Commencement No. 2) Order 2007 (SI 2007/1897). Some of the amendments made to the MCA 2005 by the Mental Health Act 2007 came into effect in October 2007 (amendment to s.20(11): The Mental Health Act 2007 (Commencement No.2) Order 2007 (SI 2007/2635); with the main amendments relating to the deprivation of liberty safeguards coming into force on 1st April 2009: The Mental Health Act 2007 (Commencement No.10 and Transitional Provisions) Order 2009 (SI 2009/139). For a discussion of the provisions of the Mental Health Act 2007 and its effect upon the MCA 2005, see *e.g.* P. Bowen, *Blackstone's Guide to the Mental Health Act 2007* (2007); M. A. Jones, "Detaining adults who lack capacity" (2009) *Professional Negligence* 238; A. Boyle, "The law and incapacity determinations: a conflict of governance?" (2008) 71 *MLR* 433; G. Richardson, "Mental Capacity at the margin: the interface between the two Acts" (2010) *Med L Rev* 56.

[2] The Act governs decision making for people aged 16 or over who lack capacity (s.2(5)), as well as property matters for those under 16 who are unlikely to have capacity by the age of 18 (s.18(3)). *C.f.* Mental Capacity Act 2005 *Code of Practice* ('MCA CoP'), Ch.1.

[3] Mental Capacity Act 2005, *Explanatory Notes*, para.4, http://www.legislation.gov.uk/ukpga/2005/9/notes/data.pdf . *C.f.* L.Com No.231, *Mental Incapacity* (1995), para.2.51.

present since birth".[4] The Act created a new court, the Court of Protection, which has a broad jurisdiction under the Act to make decisions in respect of incapacitated persons.[5]

Unfortunately, the decision in *HL* v. *United Kingdom*,[6] an appeal to the ECtHR from the decision of the House of Lords in the *Bournewood* case,[7] was determined just before the MCA was passed. The ECtHR held that L had been deprived of his liberty and that doctrine of necessity did not provide a lawful basis for his detention because it did not provide a procedural mechanism by which L's detention could be reviewed.[8] The Act as originally enacted failed to deal with this problem, which became known as the '*Bournewood* gap', since it merely made a distinction between deprivation of liberty and forms of restraint that did not amount to a deprivation of liberty, with the general defence in s.5[9] applying only to the latter, whilst the former was precluded.[10] Further legislation was required so that incapacitated adults could lawfully be detained under Art.5. This legislation was achieved when the MHA 2007 amended the MCA, inserting into it the Deprivation of Liberty Safeguards ('DOLS').[11] The DOLS provide a very complicated

[4] *Ibid.*
[5] MCA, Pt.II.
[6] (2005) 40 EHRR 32.
[7] [1999] 1 AC 458.
[8] For further discussion of the case, see *e.g.* R. Robinson and L. Scott-Moncrieff, "Making Sense of Bournewood" (2005) *JMHL* 17; J. Laing, "The Mental Capacity Bill 2004: human rights concerns" (2005) 35 *Fam Law* 137; M.A. Jones, "Detaining adults who lack capacity" (2007) 23 PN 238.
[9] See below, 283.
[10] MCA, s.6(5). See P. Bartlett, *Blackstone's Guide to the Mental Capacity Act 2005*, 2nd. Edn (2008), paras.4.02-4.04.
[11] MCA, s.4A, Scheds. A1 and 1A. A new supplemental Code of Practice was published to provide guidance in respect of the use of the DOLS: *Mental Capacity Act 2005: Deprivation of Liberty Safeguards:Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice* (2008), available at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_087309.pdf .

scheme whereby deprivations of liberty in relation to incapacitated adults in care homes and hospitals may be authorised.[12]

> The five statutory principles that underpin the Act are set out in section 1:
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> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him have been taken without success.
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
> (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
> (6) Before the Act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

As Bartlett has observed, the extent to which these principles are derived from the common law is "striking",[13] and they contain little new law. Subsection 1(2) sets out the well-established common law presumption of capacity in statutory form,[14] and the principle in s.1(3) may be seen as flowing from the presumption of capacity.[15] The principle contained in s.1(4), that an individual "should not be assumed to lack the capacity to make a decision just because other people think their decision is unwise",[16] was already recognised at common law: there was no requirement to behave "in such a

[12] The provisions apply only to those over 18. Children may be detained under the Children Act 1989 or the Mental Health Act 1983. A detailed analysis of the DOLS is beyond the scope of this study, see *e.g.* Bartlett (n.10), Ch.4; M. Brazier and E. Cave, *Medicine, Patients and the Law*, 5th edn. (2011), 158-160. The courts have considered the provisions and the issue of when a deprivation of liberty arises on a number of occasions: *W PCT* v. *TB* [2009] EWHC 1737; *G* v. *E* [2010] EWHC 621 (Fam), [2010] EWCA Civ 822; *GJ v. E* [2009] EWHC 2972 (Fam); *A Local Authority* v *C* [2010] EWHC 978 (Fam); *P and Q* [2011] EWCA Civ 190; *Cheshire West and Cheshire Council* v *P* [2011] EWCA Civ 1257.
[13] Bartlett (n.10), para.3.16.
[14] See *e.g.* MCA CoP, para.2.3: "This principle states that every adult has the right to make their own decisions- unless there is proof that they lack the capacity to make a particular decision when it needs to be made. This has been a fundamental principle of the common law for many years and is not set out in the Act".
[15] Bartlett (n.10).
[16] MCA CoP, para.2.10.

manner as to deserve approbation from the prudent, the wise or the good".[17] The principle in s.1(5) was enshrined in the common law justification of necessity, whilst the principle of adopting the least restrictive alternative in s.1(6), had been recognised at common law in cases such as *Re LC (Medical Treatment: Sterilisation)*[18] and *Re SL (Adult Patient)(Medical Treatment)*.[19]

Similarly, the common law test for capacity, *Re C(Adult: Refusal of Treatment)*[20] formed the basis for the test for capacity set out in sections 2 and 3 MCA:[21]

> s.2(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
> (2) It does not matter whether the impairment or disturbance is permanent or temporary....
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> s.3(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable–
> (a) to understand the information relevant to the decision,
> (b) to retain that information,
> (c) to use or weigh that information as part of the process of making the decision, or
> (d) to communicate his decision (whether by talking, using sign language or any other means).....[22]

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[17] *Bird v. Luckie* (1850) 8 Hare 301, 68 ER 375, Sir Knight Bruce VC, 378. See also: *St. George's Healthcare NHS Trust v. S* [1999] Fam 26, 63; *B v. An NHS Hospital Trust* [2002] EWHC 429 (Fam); [2002] 1 FLR 1090, [100]. Re the application of this principle under the MCA, see: *In Re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549 (Fam), [2011] Fam 61, [61].

[18] [1997] 2 FLR 258.

[19] [2000] 2 FCR 452.

[20] [1994] 1 All ER 819. The test required that a patient be able to comprehend and retain treatment information, believe it, and weigh it in the balance to arrive at a choice. Approved in *Re MB (An Adult: Medical Treatment)* [1997] 2 FLR 426. *C.f. Local Authority X* v *MM* [2007] EWHC 2003 (Fam).

[21] As was recognised in *RT* v *LT* [2010] EWHC 1910 (Fam), Sir Nicholas Wall P, [48]

[22] In *R* v *C* [2009] 1 WLR 1786, Baroness Hale (at [29]) stated that s.2(1):

> ...clearly covers people with physical injuries of the brain, for example, head injuries or strokeswhich prevent them communicating as well as people with disorder of the mind with has the same effect.

This retains the common law's functional approach to capacity:[23] capacity must be assessed in relation to the specific issue in question.[24] The Court of Protection has made it clear that the test essentially requires an assessment of whether the individual is capable of understanding information about the issue in question and able to weight up the pros and cons in relation to the issue to reach a decision.[25] The Court of Protection has indicated that, although pre-MCA case law is not obsolete, "the essential task of the judge is to apply the plain words of the statute to the facts of the case before the court",[26] with pre and post-Act case law only to be referred to when "necessary".[27]

The key role of best interests in determining whether treatment should be provided to an incapacitated adult is retained by s.1(2). It has been stated that the "best interest test under the Mental Capacity Act effectively codifies the approach under the inherent jurisdiction",[28] and the Court of Protection has confirmed that Parliament has endorsed the 'balance sheet' approach adopted in *Re A(Male Sterilisation).*[29] However, important features of the MCA and the CoP are its non-discriminatory approach, and the emphasis which they place upon facilitating capacitous decision-making where possible, and

[23] *Ball* v *Mallin* (1829) 3 Bligh NS 1; *Park* v *Park* [1952] P 112; *In re Beany* [1978] 1 WLR 770.
[24] See *e.g. Re Cloutt* (2008) unreported, where it was held that the capacity to revoke an enduring power of attorney (EPA) is not necessarily the same as the capacity to create a lasting power of attorney (LPA), because the two are different transactions. Available at: http://www.justice.gov.uk/guidance/protecting-the-vulnerable/mental-capacity-act/orders-made-by-the-court-of-protection/lasting-powers-of-attorney.htm .
[25] *RT* v *LT* (n.13), [43]-[44]. *C.f.* Brazier and Cave, (n.10), 146-147.
[26] *RT* v *LT* (n.25) [50]. The reasons behind this approach appear to be essentially pragmatic, being related to a desire to save court time and keep the issues in the case as simle as possible: "The Court of Protection is...generating a lot of work, much of it very difficult...complicating factors should, if possible, be avoided".
[27] *Ibid.*, [51]. It was suggested that one area in which it might be necessary to look at case law on the issue of capacity was the "field of sexual relations": *R* v *C* (n.14); *D County Council* v. *LS* [2010] EWHC 1544 (Fam); *D Borough Council* v. *AB* [2011] EWHC 101 (Fam). *C.f. A Local Authority* v *A* [2010] EWHC 1549 (Fam), where the issue of capacity to consent to/refuse contraception was considerd.
[28] *Surrey County Council* v. *MB* [2007] EWHC 3085 (Fam), Charles J, [6].
[29] [2000] 1 FLR 549. See *In The Matter of P* [2009] EWHC 163, Lewison J, [41]; *ITW* v *Z* [2009] EWHC 2525(Fam).

consulting individuals , carers and other relevant parties and taking into account their views. These matters are reflected in the guidance in respect of best interests provided in s.4:

> (1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of–
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> (a) the person's age or appearance, or
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> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
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> (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
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> (3) He must consider–
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> (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
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> (b) if it appears likely that he will, when that is likely to be.
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> (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.....
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> (6) He must consider, so far as is reasonably ascertainable–
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> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
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> (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
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> (c) the other factors that he would be likely to consider if he were able to do so.
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> (7) He must take into account, if it is practicable and appropriate to consult them, the views of–
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> (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
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> (b) anyone engaged in caring for the person or interested in his welfare,
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> (c) any donee of a lasting power of attorney granted by the person, and
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> (d) any deputy appointed for the person by the court,
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> as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).
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> (8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which–
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> (a) are exercisable under a lasting power of attorney, or
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> (b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity....[30]

[30] See also: CoP, Ch.5.

However, even with this explicit guidance, problems in relation to the determination of best interests may remain: as I identified in Chapter 7, the intrusion of 'stock' notions into the decision-making process may still lead judges to favour a medicalised approach, and there is a risk that the views of the patient and their carers may be conflated.[31]

The end of necessity?

Section 5 of the Act creates a general defence, which appears at first blush to remove any need to have recourse to common law necessity in future:

> s.5. For the purposes of this Act, a person lacks capacity in relation to a matter
> (1) If a person ("D") does an act in connection with the care or treatment of another person ("P"), the act is one to which this section applies if—
> (a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and
> (b) when doing the act, D reasonably believes—
> (i) that P lacks capacity in relation to the matter, and
> (ii) that it will be in P's best interests for the act to be done.
> (2) D does not incur any liability in relation to the act that he would not have incurred if P—
> (a) had had capacity to consent in relation to the matter, and
> (b) had consented to D's doing the act.
> (3) Nothing in this section excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act...

This appears to provide a defence to anyone providing reasonable care to an incapacitated person, provided that the care or treatment is in that person's best interests. The CoP specifically acknowledges that this section is "based on the common law 'doctrine of necessity'".[32] This raises the question of whether there is any place left for the use of the justification of necessity in medical law, particularly in cases involving the treatment and

[31] See *e.g.* M. Donnelly, "Best Interests, Patient Participation and the Mental Capacity Act" (2009) 17 *Med L Rev* 1.
[32] CoP, Ch.6, 94.

care of incapacitated adults, and whether 'common law necessity' may be consigned to the history books.

Where a statute provides for a scheme that sets out the entire legal basis for conduct, then the orthodox approach appears to be that there is no longer any basis for a justification of necessity.[33] For example, in *R v. Quayle*,[34] the Appellants argued that 'medical necessity' could provide a good defence to charges relating to the importation, cultivation, possession and supply of cannabis. The Court of Appeal refused to recognise such a defence, on the basis that the relevant legislative scheme under the Misuse of Drugs Act 1971 made "the most careful provision"[35] in respect of the "production, importation, possession, supply, prescription and use"[36] of controlled drugs for medical or other purposes and the courts therefore had to give effect to this scheme.[37] Since to permit the necessitous medical use of cannabis would lead to "conflict with the purpose and effect of the legislative scheme",[38] the creation of such a defence was a matter for Parliament and not for the common law.[39] If this approach were to be followed in respect

[33] See *e.g.* P.R. Glazebrook, "The Necessity Plea in English Criminal Law", [1972A] 20 *CLJ* 87, 90; D. Ormerod, *Smith and Hogan's Criminal* Law, 13th edn. (2011) 367-368, 614; A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 4th edn. (2010) 787-789.
[34] [2005] EWCA Crim 1415, [2005] 2 Cr App R 34.
[35] *Ibid.*, [54].
[36] *Ibid.*
[37] *Ibid.* [55].
[38] *Ibid.* [56].
[39] *Ibid.* For further discussion in relation to this case, see: D. Ormerod, "Necessity of Circumstance" (2006) *Crim LR* 148; A. Reed, "The defence of necessity and the supply of cannabis" (2005) *Crim Law* 1, and J. Rogers, "Posession of cannabis for medicinal purposes" (2005) 64 *CLJ* 535. *Quayle* has subsequently been applied in *R v Altham* [2006] EWCA Crim 7; [2006] 2 Cr App R 8, [29]: A. Ashworth, "Defence of Necessity: possession of class B drug - drug used as pain relief strategy" [2006] *Crim L R* 633. It has been suggested that a similar approach would be adopted in relation to the law of abortion, with the courts holding that the decision in *Bourne* [1939] 1 KB 687 had been overruled by s.5(2) of the Abortion Act 1967: see Ormerod, (n.33), 613-614. *C.f. R v Bournewood Community & Mental Health NHS Trust, ex p. L* [1998] 2 WLR 764, where the CA held that the power of a hospital to detain a patient for mental disorder

of the MCA, and it were to be held that the Act 'covered all of the ground' so far as the lawful provision of treatment and care to incapacitated adults was concerned, then there would be no place for any common law defence of necessity.

In very rare circumstances, necessity may still have a role to play in justifying the treatment of children. In relation to children, a court has wide powers to consent to medical treatment or care under the Children Act 1989 or the inherent jurisdiction.[40] In the "exceptionally rare event"[41] of a court having to determine whether a child should be treated when such treatment was not in the child's best interests, as occurred in *Re A (Children)(conjoined twins:surgical separation*),[42] where the court was asked to sanction the separation of conjoined twins, even though this would kill one of the twins, a defence of necessity along the lines of that used by Brooke LJ in that case might potentially be available.[43] The Mental Capacity Act 2005 does not generally apply to children under 16,[44] and would not alter the position in such a rare and difficult case.

However, in relation to incapacitated adults, the position is much less clear. On the one hand, it may be persuasively argued that the coming into force of the Mental

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was to be found solely in the MHA 1983, and that the provisions of that Act applied to the exclusion of any defence of necessity. The CA were overruled by the HL on this point: [1999] 1 AC 458.

[40] See above, 217.

[41] [2000] 4 All ER 961, Brooke LJ 1051.

[42] [2000] 4 All ER 961.

[43] Brooke LJ held (at 1052), that the separation operation was justified because it met the conditions for the defence of necessity outlined by Stephen:

> ...(i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; and (iii) the evil inflicted must not be disproportionate to the evil avoided.

[44] MCA, s.2(5). There are some exceptions to this: the Court of Protection may deal with the property of an incapable minor under 16 if it considers that the minor will continue to lack capacity once 18 (s.18(3)) and the offence of ill-treatment or wilful neglect of a person lacking capacity has no age limit (s.44). Some provisions of the Act only apply to people over the age of 18: the signing of a lasting power of attorney (s.9(2)(c)); the making of an advance decision to refuse treatment (s.24(1)) and the DOLS (Sch.A1, para.13).

Capacity Act 2005 means that there is no longer any place for the use of common law necessity. On the other, Bartlett has raised the possibility of common law necessity as a justification still being available in certain instances, although he accepts that the position is unclear.[45] This argument is based upon the wording of section 2 of the MCA. Bartlett has suggested that, in the light of the wording of s.2, there may be situations in which a common law defence of necessity might still be used in respect the treatment of incapacitated adults. In particular, he suggests that the common law defence of necessity might still be relevant in cases of "an individual suffering from a severe physical injury following a car accident. When the ambulance arrives, they may be distracted by pain, and therefore unable to give meaningful consent",[46] and in cases where treatment and care has to be provided to an individual who is intoxicated or "immobilised by a severe muscular disease" and similarly unable to provide a valid consent.[47] In these cases, Bartlett suggests that it might be difficult properly to regard the individuals as suffering from an "impairment of, or a disturbance in the functioning of, the mind or brain",[48] particularly in relation to intoxication: "having had too much to drink is not in itself a medical condition".[49]

The Code of Practice to the MCA indicates that: "Examples of an impairment or disturbance in the functioning of the mind or brain" may include: "physical or medical conditions that cause confusion, drowsiness or loss of consciousness" and the "symptoms

[45] Above, (n.10), 148.
[46] *Ibid.*
[47] *Ibid.*, 49-50.
[48] *Ibid.*, 148; MCA, s.2(1).
[49] *Ibid.*, 50.

of alcohol or drug use",[50] which would appear to include emergency situations where one is in too much pain to decide and cases of intoxication within the ambit of the Act. The example of the individual with "severe muscular disease" appears to be more difficult to accommodate within s.2(1) because the physical impairment arguably does not affect "the way that their mind or brain works".[51] Bartlett has suggested that, in these examples given by him, in the light of the opinion of the Law Commission that this 'diagnostic threshold' would safeguard individual rights,[52] and that the intention of Parliament was not to include such cases within the scope of the MCA:[53]

> It might...be better to keep a firm grip on the scope of the diagnostic threshold and to refuse to apply the MCA. That would still leave necessity as an available defence, and one that might better fit the facts of the situation. This would be an example of the continued use of necessity used to strengthen safeguards in the MCA.[54]

If the courts were to adopt such an approach, it would be likely that the use of necessity would return to justify the treatment of incapacitated adults, to a very limited range of emergency situations, similar to the use of necessity as a common law defence prior to *Re F*.[55] Expanding it beyond such situations would be likely to undermine the scheme for

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[50] CoP, paras.4.11-4.12.

[51] CoP para.4.3. Section 3(1) MCA provides that "a person is unable to make a decision for himself if he is unable...(d) to communicate his decision". However, the inability to decide would still have to be "because of an impairment of, or a disturbance in the functioning of, the mind or brain" to fall within the s.2(1) criteria. *C.f.* the recommendation in L.Com 231 that:

> A person should be regarded as unable to make a decision if at the material time he or she is:
> (1) unable by reason of mental disability to make a decision on the matter in question, or
> (2) unable to communicate a decision on that matter because he or she is unconscious or for any other reason.

[52] L.Com. Report No. 231, *Mental Incapacity*, para 38. For further discussion of the Law Commission ('L.Com') proposals, see: P. Wilson, "The Law Commission's Report on Mental Incapacity: Medically Vulnerable Adults or Politically Vulnerable Law?" (1996) 4 *Med L Rev* 227. For discussion re previous L.Com proposals, see *e.g.* M. Gunn, "The Meaning of Incapacity" (1994) 2 *Med L Rev* 8; P. Fennell, "Statutory Authority to Treat, Relatives and Treatment Proxies" (1994) 2 *Med L Rev* 30 and M. Freeman, "Deciding for the Intellectually Impaired" (1994) 2 *Med L Rev* 77.

[53] Bartlett, (n.10), 50

[54] *Ibid.*, 148.

[55] Above, Ch.5. Bartlett (n.10), 148, fn.110.

decision making on behalf of incapacitated adults created by the MCA and create legal uncertainty as to the ambit of both the Act and the common law and the relationship between the two jurisdictions.[56] It is uncertain whether courts dealing with the examples given by Bartlett would wish to look outside the MCA to the common law of necessity for a solution. It is suggested that generally, those treating individuals in these situations would be protected by the general defence provided by MCA s.5, which arguably covers the ground of any necessity defence.

It may be that a further gap in the law arises in relation to the DOLS, which leaves some scope for the use of necessity. Shah and Heginbotham[57] have suggested that uncertainty arises in relation to the DOLS, because these only apply to those with a "mental disorder" as defined in the Mental Health Act 1983, s.1:[58]

> It is unclear, therefore, if the safeguards can be applied to individuals lacking capacity to consent to their stay in hospitals or care homes because of neurological disorders such as strokes.[59]

If these patients were not to be regarded as suffering from a 'mental disorder', then it appears that they would not be afforded protection under the DOLS or the MHA. In such an event, a court might have to consider whether the general provisions of the MCA or common law necessity applied to cover the situation.

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[56] *C.f. Ibid*., (n.9), 148-149.
[57] A. Shah and C. Heginbotham, "Newly introduced deprivation of liberty safeguards: anomalies and concerns" (2010) 34 *The Psychiatrist* 243.
[58] MCA, Sch.A1, paras.12 and 14. The definition of "mental disorder" in s.1 MHA 1983 (as amended by the MHA 2007) is: "'mental disorder' means any disorder or disability of the mind".
[59] (n.57), 244.

When the MCA came into force, the judges of the Court of Protection, when considering the scope of their powers, appeared to be willing to adopt a very flexible approach in relation to the Act and the CoP, which suggested that it was unlikely that they would feel the need to fall back upon the defence of necessity, save possibly in a very exceptional, 'hard case'. In particular, in *A Primary Care Trust* v. *AH*,[60] Sir Mark Potter P. considered the powers of the Court of Protection in relation to the making of an order sanctioning the use of reasonable and proportionate force to remove an incapacitated man from his home to a hospital and for his treatment there as an in-patient and the issue of whether the Court of Protection had power to bridge the '*Bournewood* gap' pending the coming into force of the MHA 2007 amendments to the MCA, and the commencement of the 'Deprivation of Liberty Safeguards'. The President relied upon a combination of provisions within the MCA[61] and the CoP[62] to reach the conclusion that he did have the power, concluding that such an order could be made, provided that the following conditions laid down by Munby J in *City of Sunderland* v. *PS*[63] were met, to ensure that Art.5 ECHR was complied with:

(i) That P is incapable of making a decision whether or not to go to the place of treatment and/or to stay within it;
(ii) The Court has declared in advance that it is in the best interests of P to be taken there and to be compelled to remain there by using reasonable and proportionate measures, and
(iii) That there is a mechanism for timely and ongoing review of P's capacity and best interests with regard to his remaining in the relevant unit/hospital.

[60] [2008] EWHC 1403 (Fam). See also *Surrey County Council* v. *MB* [2007] EWHC 3085 (Fam), a case commenced under the inherent jurisdiction and transferred to the Court of Protection. In that case, Charles J held that the Court of Protection had power under s.15(1)(c) MCA to make a declaration authorising the compulsory removal of MB from his home and detention for the purposes of medical treatment, if this was in his best interests. It was held that this order would not breach Art.5 ECHR provided that the three conditions set out by Munby J in *City of Sunderland* v. *PS* were met (see above).
[61] MCA, ss.15(1)(c), s.17(1)(d) and s.48.
[62] CoP, para.6.51.
[63] [2007] EWHC 623 (Fam), [2007] 2 FLR 1083

However, more recently, there have been indications from the Court of Protection that the inherent jurisdiction of the High Court and the common law justification of necessity still exist, and that, in certain circumstances, a court might be prepared to fall back upon them. In *GJ* v. *E*,[64] Charles J identified the issue of "what, if any, inherent jurisdiction the Court of Protection has and whether the High Court retains its inherent jurisdiction in this area or whether it has been suspended by the MCA", as remaining unresolved. In *Re C (Vulnerable Adult)(Deprivation of Liberty)*,[65] Munby J. took a much bolder approach and suggested that the principle of necessity still had a large role to play in justifying the actions of carers. The case involved an incapacitated adult and a child, both of whom suffered from Smith Magenis Syndrome, a genetic disorder that caused severe behavioural problems.[66] As a result of these problems, they were both locked in their bedrooms every night, although their parents would attend to them if they knocked on the door.[67] The issue in the case was whether the circumstances of their care amounted to a deprivation of their liberty, in breach of their rights under Article 5 of the European Convention on Human Rights (ECHR).[68] Munby J took the view that the inherent jurisdiction of the High Court with regard to incapacitated adults still existed,[69] and that it was:

> ...the doctrine of necessity which, in strict legal analysis, provides the legal justification for C's care by her parents, as explained in *Re S (Adult Patient)(Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam)...at paras.[20]-[21]. Now in principle there is no reason why a local authority should not, in an appropriate case, have recourse to the doctrine of necessity. But in

[64] [2009] EWHC 2972 (Fam), [22].
[65] [2010] EWHC 978 (Fam).
[66] *Ibid.*, [7]-[8].
[67] *Ibid.*, [12], [14]-[16], [22]-[26].
[68] *Ibid.*, [3].
[69] *Ibid.*, [74].

> practice it will not be appropriate for it to do so in most cases without having first enlisted the assistance of the High Court or the Court of Protection.[70]

A distinction was therefore made betwen the legal position of the parents, who Munby J appeared to regard as being governed by "the doctrine of necessity",[71] and that of the local authority, who were generally required to obtain court approval in respect of deprivations of liberty:

> Only if the person is compliant and there is no objection from those concerned with his welfare is a local authority probably going to be justified in having resort without judicial assistance to the doctrine of necessity.[72]

By contrast, in *G* v. *E*,[73] Baker J expressed the view that the court's protective inherent jurisdiction had been "substantially superseded"[74] by the "introduction of a comprehensive statutory regime for the authorization and control of placements that amount to a deprivation of liberty",[75] although it was arguable that "where the MCA cannot provide an answer, the Court of Protection should draw upon the principles established under the inherent jurisdiction".[76] This more guarded view was described by the Court of Appeal as being "plainly right".[77] In addition, in *BB* v. *AM*,[78] Baker J observed that the Court of Protection's statutory power under s.15 MCA did not extend to making declarations as to whether an individual had been deprived of their liberty, and

[70] *Ibid.*, [70].
[71] *Ibid.*
[72] *Ibid.*, [75].
[73] [2010] EWHC 621 (Fam)
[74] *Ibid.*, [73].
[75] [2010] EWHC 621 (Fam). *C.f. GJ v. E* [2009] EWHC 2972 (Fam), Charles J., at [23].
[76] *Ibid.*
[77] [2010] EWCA Civ 822; [2010] 2 FCR 601, Sir Nicholas Wall, P., at [26]. For further discussion re this case see *e.g.* T. Elliott, "Deprivation of Liberty and the Mental Capacity Act 2005" [2009] *Med L Rev* 132.
[78] [2010] EWHC 1916 (Fam).

suggested that: “It may therefore be that the court’s power to make such declarations arises under the inherent jurisdiction”.[79]

In the light of these recent decisions, it appears that we have not seen the demise of the inherent jurisdiction or common law necessity. However, the precise ambit of both remain unclear, and it appears that there is some difference of opinion between the judges dealing with cases involving incapacitated adults as to the extent to which recourse should be had to the comon law.

[79] *Ibid.*, [12].

Conclusion

The case of *Re F*, in the period between 1989 and the coming into effect of the MCA, fulfilled a crucial role in medical law, since it established the justification of common law necessity, which provided the lawful basis for the treatment and care of incapacitated adults. Common law necessity has been extensively used by the courts to justify the provision of medical treatment,[1] and the withdrawal of treatment,[2] and to resolve a wide variety of issues in relation to incapacitated adults, such where they live,[3] and whether they are capable of marrying.[4] The justification was effectively used to create a substitute for the former *parens patriae* jurisdiction.[5] This use of necessity in medical law cases contrasts markedly with the approach of the courts to defences of necessity in civil and criminal litigation, where the courts have been extremely reluctant to admit claims of necessity, save in 'one-off' emergency situations.[6] This study arose out of a desire to test the assertion made by Lord Goff in *re F* that "there exists in the common law a principle of necessity which may justify action which would otherwise be unlawful";[7] to explore why the defence had been so extensively used in medical cases, and to examine the development of the justification, and doctrinal tensions which had arisen, particularly in relation to the concepts of necessity, best interests and the *Bolam* test.

[1] *Re F* [1990] 2 AC 1; *Re W* [1993] 1 FLR 381.
[2] *E.g. Bland* [1993] AC 789.
[3] *E.g. A* v *A Health Authority* [2002] EWHC 18 (Admin/Fam).
[4] *E.g. Sheffield CC* v. *E* [2004] EWHC 2808 (Fam).
[5] Above, 275-279.
[6] Above, Ch.5.
[7] [1990] 2 AC 1, 74.

In exploring these issues, I have drawn upon the philosophical approach of pragmatism. Pragmatism is not without its faults, which I have sought to explore in Part I of this study, and Dworkin has been particularly critical of what he regards as its focus upon short-term expediency, and failure to take legal rights seriously.[8] However, I suggest that it provides a highly plausible account of how common law judges decide cases. Both the pragmatic approach and the common law place emphasis upon facts and upon practical, common sense outcomes, rejecting theory for theory's sake.[9] But the assistance which pragmatic theory offers to those studying common law judicial decision-making goes beyond merely drawing comparisons between pragmatic theory and common law practice. I suggest that it provides a helpful and instructive framework when one is studying the development of the common law and the way in which common law judges decide cases. In particular, a critical consideration of common sense and the role that it plays in pragmatic decision-making helps one to identify the unspoken assumptions and 'stock' notions which are drawn upon when 'common sense' decisions are made, which may unconsciously import bias and error into the decision-making process. For example, reliance upon stock notions such as the 'altruistic doctor as rescuer' and medicine as an inevitable progressive science may be identified in the assessment of best interests in cases involving incapacitated adults and may lead judges to favour a medicalised approach. In addition, an analysis of the tensions which may arise when judges expand existing legal principles to resolve gaps in the law and solve particular problems within the law is particularly helpful when one is considering the justification of common law necessity, because it helps to reveal and explain the

[8] R. Dworkin, *Law's Empire* (1986), 160-161.
[99] See e.g. E.W. Thomas, *The Judicial Process* (2005), 312.

paradoxical nature of the defence and to shed light upon the relationship between necessity and the concept of best interests.

As I have demonstrated in Chapter 3, particularly difficult and acute legal problems may arise out of legal practice. In cases involving issues relating to personal autonomy and the sanctity of life, these may be inextricably intertwined with difficult social and moral issues. The courts have recognised that, in certain instances, authoritative guidance needs to be provided to doctors, so that they know in advance whether they are acting within the law and may give treatment to those who require it, without being hampered by concerns about the legality of their actions. This need has been met by the development of the declaratory jurisdiction and its extensive use in cases involving issues of medical law. The availability of declaratory relief in this context serves as an illustration of the common law's emphasis upon providing practical legal remedies to resolve legal issues, and has been key to the development and use of necessity in medical law.

Lord Goff may have regarded the principle of necessity as being an important common law principle, but an extensive examination of civil and criminal cases in which necessity justification have been raised, and the doctrine relating to *negotiorum gestio* and agency of necesity, reveals a picture that is far from clear. The reality is that courts have been very unwilling to admit claims of necessity save in cases of emergency, largely because of fears that such defences may get out of hand and undermine pre-existing doctrine. The precise extent of such defences and their relationship with other defences,

such as private defence, remains obscure. The common law had not, prior to *re F*, recognised a justification of necessity which was capable of performing the role that common law necessity has fulfilled. Lord Goff's creation of common law necessity was essentially an act of judicial creativity.

The House of Lords in *re F* was faced with a gap in the law: the *parens patriae* jurisdiction had come to an end without any statutory provision being made for the treatment and care of incapacitated adults. Since the common law did not make any provision for a proxy consent to be provided, there was an issue as to whether, and upon what basis, such treatment and care could lawfully be provided. A decision that such treatment was unlawful would have been likely to appear to be contrary to common sense and incomprehensible, at least to some lawyers, so some legal solution had to be found. Having explored the available options, I suggest that, although common law necessity was a judicial 'creation', it nevertheless had very significant doctrinal advantages over the alternatives, particularly because it did not involve the strained use of legal fictions, such as implied consent. The use of the justification in conjunction with the declaratory jurisdiction allowed judges to create what became effectively a substitute *parens patriae* jurisdiction. The availability of the declaratory jurisdiction, which is highly flexibly in nature and provides judges with significant discretion as to when relief will be provided, allowed the courts to keep the volume of litigation within manageable limits, whilst at the same time ensuring that the justification did not get out of hand. A very practical solution to a systemic problem.

A more detailed examination of the justification of common law necessity reveals what I have suggested is best regarded as a pragmatic paradoxical construct. It is paradoxical to the extent that it is a necessity defence justifying conduct which would otherwise be unlawful and because it is capable of justifying conduct which cannot be regarded as being strictly necessary. However, at its heart the justification is essentially a best interests defence. This use of the vague concept of best interests within necessity allowed courts to maintain the outward appearance of maintaining legal coherence and consistency, whilst at the same time maintaining a great deal of flexibility so that judges could deal with a wide variety of cases in an appropriate manner. The development of common law necessity since *re F,* is similarly influenced by pragmatic considerations. Case such as *Simms* v. *Simms*,[10] and *re Y,* [11] demonstrate that the courts are prepared to approach legal principle in a flexible manner in order to achieve what they regard as the right result.

Of course, the Mental Capacity Act 2005 (MCA) is now in force and governs the care and treatment of incapacitated adults. It might therefore be suggested that the study of a justification that has been been largely 'overtaken' by statutory law is no longer relevant. I suggest that this is a relevant and worthwhile study for a number of reasons. First, a study of the historical roots of current law is valuable in itself, because it helps us to place that law into its proper context: to understand where the current law came from and how and why it reached its current state. This is particularly important in relation to the MCA, because as we have seen in Chapter 8, this is a piece of legislation which very

[10] [2003] 1 All ER 593.
[11] [1997] 2 FCR 172

much has its roots in the common law: whilst distinctions may be made between the manner in which the MCA treats issues such as capacity and best interests and the approach of the common law, there are very substantial similarities, and decisions made under the common law regime may still need to be considered when the Court of Protection is making a decision in respect of an incapacitated adult under the MCA. The critical scrutiny of judicial decision-making may be said to be a worthwhile exercise, because it assists us to attain a better understanding of the common law, but also because such scrutiny may help judges to approach the process of formulating judgments with a more reflective and critical eye, recognising assumptions that they make about people's behaviour to supplement the evidence in a particular case.

More particularly, justifications of necessity are still of legal interest because they have not vanished with the coming into effect of the MCA. Necessity defences are still available, to be raised in criminal cases and claims in tort. The ambit and doctrinal limits of these defences and the precise relationship between defences such as duress of circumstances and necessity in criminal law, remains unclear, and it appears that such claims are very unlikely to be admitted outside of the paradigmatic 'one-off emergency' situation. The doctrine of agency of necessity still exists, and has arguably been expanded by the reliance made upon the doctrine by Lord Goff in *Re F*.[12] Most significantly, it appears that both common law necessity and the availability of the inherent jurisdiction of the court survive the coming into effect of the MCA, although the precise role that necessity plays in filling any gaps in the law has not yet been worked out by the courts. It

[12] See *e.g.* D. Sheehan, "Negotiorum gestio: a civilian concept in the common law?" (2006) *ICLQ* 253, 253, n.5.

appears from his judgment in *Re C (Vulnerable Adult)(Deprivation of Liberty)*,[13] that Munby LJ still regards the doctrine and the inherent jurisdiction as having an extensive role to play in cases where incapacitated adults are being deprived of their liberty, although his fellow judges appear to adopt a more reserved approach:[14] regarding the justification as having been "substantially superseded"[15] by the statutory scheme. It appears that the justification of common law necessity remains available to be used in appropriate cases, although what those cases are remains to be seen.

[13] [2010] EWHC 978 (Fam).
[14] *G v E* [2009] EWHC 2972 (Fam); *G* v. *E* [2010] EWHC 621 (Fam);[2010] EWCA Civ 822; [2010] 2 FCR 601.
[15] *G v E* [2009] EWHC 2972 (Fam), Baker J, [73].

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